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Supreme Court, U.S.
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In The

Supreme Court of the United States

WAYNE LAMAR JENKINS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Court has previously held that a search warrant must particularly describe the things to be seized. Here, the Supreme Court of Alabama held that the affidavit in support of the application for the search warrant satisfied the requirements of the Fourth Amendment to the United States Constitution.

1. Does the Fourth Amendment to the United States Constitution require a search warrant to particularly describe the thing to be seized, regardless of the contents of the application for the search warrant?

2. Are the words of the Fourth Amendment to the United States Constitution precise and clear in that these words require that all warrants be based on probable cause, particularly describe the "things to be seized," and must these words be accorded the most scrupulous exactitude?

3. Must the protections guaranteed to all citizens by the Fourth Amendment to the United States Constitution be enforced if guaranteeing these protections "hampers law enforcement?"

THE PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all the parties. Petitioner, Wayne Lamar Jenkins, is an individual who resides in the State of Alabama.

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OPINIONS AND JUDGMENTS BELOW

This action was initiated by the Respondent's appeal of the Order of the Circuit Court of Lee County, Alabama, granting the Petitioner's motion to suppress evidence obtained in violation of the Fourth Amendment to the United States Constitution. The Order of the Circuit Court of Lee County, Alabama is reprinted in the Appendix at App. 65-91, and there is no official or unofficial citation for this order. On May 25, 2007, the Court of Criminal Appeals of Alabama reversed the Order of the Circuit Court of Lee County, Alabama. This opinion is reprinted in the Appendix at App. 51-64, and there is no official citation. The unofficial citation for this opinion is *State v. Jenkins*, CR-05-1833, 2007 WL 1519000 (Ala. Crim. App. May 25, 2007). The Supreme Court of Alabama modified its opinion of January 16, 2009, by substitution on June 26, 2009. The Supreme Court of Alabama's modified opinion affirmed the opinion of the Court of Criminal Appeals of Alabama. This opinion is reprinted in the Appendix at 1-50, and there is no official citation. The unofficial citation for this opinion is *Ex parte Jenkins* (*In re: State of Alabama v. Wayne Lamar Jenkins*), No. 1061674, 2009 WL 1818636 (Ala. June 26, 2009).

BASIS FOR JURISDICTION IN THIS COURT

The Petitioner filed a motion to suppress evidence obtained in violation of the Fourth Amendment to the United States Constitution in the Circuit Court of Lee County, Alabama. The Circuit Court suppressed the evidence based on the finding that the warrant was unconstitutionally vague. The State timely appealed the decision of the Circuit Court to the Court of Criminal Appeals of Alabama. The Court of Criminal Appeals reversed the Circuit Court. The Petitioner timely petitioned the Supreme Court of Alabama for certiorari review. The Alabama Supreme Court issued its modified and substituted opinion on June 26, 2009. This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to Supreme Court Rule 10(c) and 28 U.S.C. § 1257.

Pursuant to Supreme Court Rule 14(e), the Petitioner provides the following information:

(i) Date of the judgment sought to be reviewed was originally entered:

January 16, 2009, by the Supreme Court of Alabama.

(ii) Date of any order respecting rehearing:

June 26, 2009, the Supreme Court of Alabama overruled the Petitioner's Application for Re-Hearing and substituted and modified its opinion of January 16, 2009.

(iii) Rule 12(5) considerations:

Not Applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

U.S. CONST. art. III; U.S. CONST. amend. IV;

U.S. CONST. amend. XIV, § 1; 28 U.S.C. § 1257

(v) Rule 29.4 Statement:

Not Applicable to this Petition

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Michael R. Stanford, Jr. ("Stanford") was arrested for attempting to break into the home of Wayne Lamar Jenkins ("Jenkins"). Lee County Sheriff's Office ("LCSO") Deputy Investigator Eric McCain[1] ("McCain") interviewed Stanford at the time of Stanford's arrest. Stanford was unknown to McCain.

On April 22, 2005, Stanford gave a self-serving statement consisting of an accusation concerning the contents of Jenkins' home, including the alleged presence of marijuana, to McCain. Stanford did not state the time frame at which he claimed to have seen marijuana in Jenkins' home.

Based on the self-serving accusation of a previously unknown informant, without any time specification, LCSO Deputy Investigator, Captain Van Jackson obtained a search warrant for Jenkins' residence on April 22, 2005. Jenkins was arrested the same day as a result of the execution of the search warrant.

[1] McCain is no longer employed by the Lee County Sheriff's Office.

The search warrant authorized a search of:

> Any/all vehicles, people, or buildings located on/or within the curtiledge [sic] of the residence of [Home Address Omitted][2] . . . [for] . . . [a]ny/all, drugs, contrans [sic] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, sell [sic], and or storage of these type items[.]

(alteration added).

The Grand Jury of Lee County, Alabama, indicted Jenkins for marijuana trafficking on May 9, 2006.

On May 30, 2006, Jenkins filed a Motion to Suppress, based on the State's violation of the protections of the Fourth Amendment to the United States Constitution. The Circuit Court of Lee County, Alabama, Hon. Judge John V. Denson, II ("trial court") presided over the suppression hearing.

On June 28, 2006, the trial court issued an Order granting Jenkins' Motion to Suppress based upon the search warrant being unconstitutionally vague. On June 29, 2006, the State filed a motion to appeal the trial court's decision.

The State filed its Appellant brief on August 25, 2006; Jenkins filed his Appellee brief on October 12,

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[2] The address contained within the warrant was that of Jenkins.

2006. On May 25, 2007, the Court of Criminal Appeals reversed the decision of the trial court.

On June 1, 2007, Jenkins filed an application for rehearing to the Court of Criminal Appeals of Alabama. The Court of Criminal Appeals overruled Jenkins' application for rehearing on August 17, 2007.

On August 24, 2007, Jenkins petitioned the Supreme Court of Alabama for a writ of certiorari to the appellate court. The court granted Jenkins' petition on October 23, 2007. The Supreme Court of Alabama issued an opinion affirming the decision of the Court of Criminal Appeals on January 16, 2009. Jenkins timely filed a motion for rehearing. The Supreme Court of Alabama overruled Jenkins' application for rehearing and modified and substituted its original opinion in the case on June 26, 2009.

ARGUMENT FOR GRANTING THE WRIT

I. This Court should grant the petition to resolve a conflict between the decision of the highest court in Alabama and the decisions from this Court over whether a warrant is required to satisfy the particularity clause of the Fourth Amendment to the United States Constitution. U.S. CONST. amend. IV.

A. The Supreme Court of Alabama's decision conflicts with this Court's decision in *Groh v. Ramirez*, 540 U.S. 551 (2004).

Jenkins' case involves the particularity required of a search warrant. The trial court suppressed the evidence in Jenkins' case:

> Because of the use of the term "drugs" and other wording of the search warrant, which was not consistent with the affidavit in support of the application for search warrant, the search warrant allows for a "general search" of the location and therefore is unconstitutional on its face. *See Peavy* [*v. State,* 336 So.2d 199 (Ala. Crim. App. 1976)] supra, *Go-Bart* [*Imp. Co. v. U.S.*, 282 U.S. 344 (1931)] and others.

(Unreported Order of the trial court) (alteration added).

The Supreme Court of Alabama affirmed the Court of Criminal Appeals' reversal of the trial court based on *State v. Broell*, 814 P.2d 44, 46-47 (Mont.

1991), for the holding that an application for a search warrant read together with the search warrant could satisfy the particularity clause of the Fourth Amendment to the United States Constitution. *Ex parte Jenkins*, 2009 WL 1818636, at *4-*5. The Alabama Supreme Court's holding is contradicted by the plain language of the Fourth Amendment and the holding of this Court in *Groh*, 540 U.S. 551. The facts in Jenkins' case are nearly identical to the facts of *Groh* concerning the "particularity clause" in the warrant. The exact same legal issue was presented in both cases: Whether the warrant complied with the particularity clause of the Fourth Amendment.

In *Groh*, this Court held: "[t]he fact that the application adequately described the 'things to be seized' does not save the warrant from its facial invalidity. . . . It is the warrant that 'requires particularity' and not 'the supporting documents.'" *Ex parte Jenkins*, 2009 WL 1818636, at *13 (See, J., dissenting) (quoting *Groh v. Ramirez*, 540 U.S. at 557).

Additionally, even if the decision in *Groh* or some other authority allowed supporting documents to "cure" the failure of the warrant to comply with the particularity clause, there is no evidence in the record that supporting documents accompanied the warrant, or the documents were referenced in the warrant. *See Ex parte Jenkins*, 2009 WL 1818636, at *13 n.11 (See, J., dissenting).

For these reasons, the Supreme Court of Alabama erred. The search warrant did not conform to the requirements of the Fourth Amendment; and the affidavit—if it did accompany the search warrant—cannot supply the precision required by the Fourth Amendment.

B. The Supreme Court of Alabama's decision conflicts with this Court's decision in *Stanford v. State of Tex.*, 379 U.S. 476 (1965) and *Silverman v. U.S.*, 365 U.S. 505 (1961).

The Supreme Court of Alabama held that the requirements of the Fourth Amendment to the United States Constitution are malleable to the circumstances of a given time to prevent the effects of someone from being rummaged through. The court stated as follows:

> [I]t is difficult to understand how, in the circumstances presented here, a warrant worded in the manner the warrant at issue is worded could result in an unreasonable "rummaging", since as the Supreme Court of South Carolina reasoned, marijuana and other illicit drugs would naturally be located in the same types of places.

Ex parte Jenkins, 2009 WL 1818636, at *5 (referencing *State v. Williams*, 377 S.E. 308, 309-10 (S.C. 1989)).

This holding is counter to the plain language of the Fourth Amendment and the holdings of this

Court on the same point of law. "These words are precise and clear." *Stanford*, 379 U.S. at 509. The protections of the Fourth Amendment are not simply niceties to prevent citizens' belongings from being rummaged through. *See Silverman*, 365 U.S. at 511. "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.*

The facts in the record state the search warrant in *Jenkins* authorized a search for "any and all drugs," not "illicit drugs," as stated in the opinion. *Ex parte Jenkins*, 2009 WL 1818636, at *4, *12. As explained by Justice See in his dissent and further discussed herein, the search warrant in this case does indeed permit a broader search than the probable cause contained in warrant application. "In such a search, the pills in the aspirin bottle may be analyzed, and the records of one's doctor and pharmacist that may be present in the area to be searched would be subject to review." *Ex parte Jenkins*, 2009 WL 1818636, at *15 (See, J., dissenting).

For these reasons, the Alabama Supreme Court erred. The requirement that a warrant be based upon probable cause, and be precise in the things to be seized is not flexible and not simply a "nicety," but are, rather, a fundamental right for all citizens. *See Silverman*, 365 U.S. at 511.

C. The Supreme Court of Alabama's decision conflicts with this Court's decision in *Go-Bart Imp. Co. v. U.S.*, 282 U.S. 344 (1931) and *Feldman v. United States*, 322 U.S. 487 (1944).

The Supreme Court of Alabama cited *Carlton v. State*, 449 So. 2d 250, 252 (Fla. 1984), for the holding that requiring a warrant to be any more specific in the items to be seized than "any and all drugs" would "hamper law enforcement." *Ex parte Jenkins*, 2009 WL 1818636, at *8, *10. The Supreme Court of Alabama's holding that the Fourth Amendment should be analyzed from the perspective of its imposition on law enforcement completely inverts the purpose of the Fourth Amendment.

This Court has taken a much different view of the Fourth Amendment. "[The Fourth Amendment] emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty." *Go-Bart Imp. Co. v. U.S.*, 282 U.S. at 356. (alteration added). "The [Fourth] Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Id.*

> These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their

> persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.

Stanford, 379 U.S. at 509.

This Court has also stated:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles (of the Fourth and Fifth Amendments) established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Feldman, 322 U.S. at 490 (internal citations omitted) *overruled on the other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

For these reasons, the Alabama Supreme Court erred. The principles of the Fourth Amendment are not to be sacrificed for the convenience of law enforcement. *See Go-Bart Imp. Co.*, 282 U.S. at 536.

CONCLUSION

The conflict is between the Supreme Court of Alabama and this Court as to whether a warrant must be based upon probable cause and particularly describe the "things to be seized" *See* U.S. CONST. amend. IV. The Supreme Court of Alabama failed to acknowledge the authoritative precedent decided by this Court in *Groh*; *Stanford*; *Feldman*; and *Go-Bart Imp. Co.* for this issue.

This Court should grant this Petition and resolve the conflict between the Supreme Court of Alabama and this Court, thus providing uniformity in the administration of justice.

Respectfully submitted,

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Dated: September 24, 2009

___ So.3d ___, 2009 WL 1818636 (Ala.)

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.
Ex parte Wayne Lamar JENKINS
(In re: State of Alabama
v.
Wayne Lamar Jenkins).
1061674.

Jan. 16, 2009.
As Modified on Denial of Rehearing June 26, 2009.

MURDOCK, Justice.

Wayne Lamar Jenkins was indicted for trafficking in marijuana, a violation of § 13A-12-231(1), Ala.Code 1975. He filed a motion to suppress evidence obtained pursuant to what he contended was an unlawful search warrant. After a hearing at which ore tenus evidence was presented and the receipt of briefs from Jenkins and the State, the trial court concluded that the search warrant was not supported by probable cause and that it authorized an unconstitutional general exploratory search of Jenkins's residence. The trial court granted Jenkins's motion to suppress. The State appealed. *See* Rule 15.7(a), Ala. R.Crim. P.

The Court of Criminal Appeals, in a plurality opinion, reversed the trial court's order granting Jenkins's motion to suppress and remanded the case. *See State v. Jenkins,* [Ms. CR-05-1833, May 25, 2007] ___ So.2d ___ (Ala.Crim.App.2007). That opinion held that the search warrant was supported by probable

cause and that it sufficiently described the items to be seized.

Jenkins petitioned this Court for certiorari review, alleging, in pertinent part, that the decision of the Court of Criminal Appeals conflicts with prior decisions of that court. *See* Rule 39(a)(1)(D), Ala. R.App. P. We granted Jenkins's petition to consider whether the decision of the Court of Criminal Appeals, insofar as it addressed the issue of whether the search warrant in Jenkins's case was unconstitutionally broad as a general exploratory search warrant, conflicts with its prior decisions on the same point of law.[1]

The plurality opinion of the Court of Criminal Appeals sets out the facts and procedural history of this case:

> "The record indicates that on April 22, 2005, Capt. Van Jackson of the Lee County Sheriff's Department received a telephone call from an individual named Ronnie Paul, who resides at Lee Road 482. Paul said that he had seen four men who were attempting to break into his neighbor's home at Lee Road 212. Paul provided a detailed description of the four men and described the vehicle they were driving. Shortly thereafter, sheriff's

---

[1] The Court of Criminal Appeals concluded that the materials supplied by the State in support of the application for the search warrant provided probable cause for the issuance of a search warrant. *Jenkins*, ___ So.2d at ___. We declined certiorari review as to that holding.

deputies stopped a vehicle in the vicinity of Lee Road 212 that matched the description given by Paul. Capt. Jackson testified that the two men inside the vehicle admitted that they had tried to break into the residence located at 100 Lee Road 482, Apartment # 2. Based on information received from the two men, the two other suspects were eventually located, and all four were arrested. Capt. Jackson stated in his affidavit in support of his application for a search warrant as follows:

"'After being advised of their rights, all four subjects stated that they had attempted to break into the home because they know that the owners keeps [sic] large sums of marijuana inside the residence. One of the four defendants, Michael Stanford, stated that over the past six months, he has purchased at least an ounce of marijuana from Wayne every week. According to Stanford, each of these transactions occurred in Wayne's home and there was a large quantity of marijuana present inside the residence. The Lee County Sheriff's Office was able to confirm through a tag placed on a vehicle in the front yard of the home that Wayne Lamar Jenkins is the owner of the residence. A check of Jenkins' criminal history revealed that he was arrested in 1979 on drug related charges.'

"(C.R.48.)

"One of the four suspects apprehended by law-enforcement officers, Michael Stanford,

gave an interview and stated that he tried to break into Jenkins's apartment to steal Jenkins's marijuana. Stanford, who knew Jenkins only as 'Wayne,' stated that he had been regularly purchasing marijuana from Wayne for around six months. Stanford told police that he would buy an ounce of marijuana each week and that Wayne always had a large supply available. Stanford recalled that on one occasion, Wayne had four gallon containers that were full of marijuana. Stanford said that at the present time, Wayne probably had at least a pound of marijuana in his apartment. Stanford told investigators that he had purchased ½ ounce of marijuana from Wayne approximately two weeks before the attempted burglary. Stanford said that he and his three friends had been watching the apartment on the day before the attempted burglary to observe the neighborhood and prepare for their attempt.

"The three other suspects all stated that they had attempted to burglarize Jenkins's apartment to steal Jenkins's marijuana. They stated that Jenkins kept a large amount of marijuana in his home and that they all decided to break in and steal the contraband. However, none of these three suspects had any personal knowledge that Jenkins kept marijuana inside his apartment."

___ So.2d at ___.

A warrant was issued to Capt. Van Jackson on April 22, 2005, that authorized a search of "[a]ny/all

vehicles, people, or buildings located on or within the [curtilage] of [Jenkins's] residence" for "[a]ny/all drugs, contraban[d] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, [sale], and/or storage of these type items." The opinion of the Court of Criminal Appeals continues as follows:

> "During the search, law-enforcement officials found over five pounds of marijuana, plastic bags, a financial ledger, a .38-caliber pistol with a box of ammunition, scales, a grinder, rolling papers, and approximately $5,000 in cash. Officers also found a marijuana cigarette in Jenkins's automobile. In his statement to law-enforcement officers, Jenkins admitted that he had been selling marijuana for approximately six months. He stated that the cash found in his apartment was proceeds from the sale of marijuana. He also stated that he had previously been arrested in Russell County for driving under the influence and possession of marijuana.
>
> "In June 2006, a suppression hearing was held in the trial court. At the hearing, Capt. Jackson testified regarding the circumstances that led to his application for the search warrant. Capt. Jackson stated that on April 22, 2005, the sheriff's office received a telephone call from Ronnie Paul, who told him that he had observed four men attempting to break into a neighbor's home. Capt. Jackson testified that Deputy Bill McQuire responded to the call and talked with Paul.

Paul gave Deputy McQuire a description of the four men, along with a description of the car they were driving. Capt. Jackson said that, after receiving that information from Deputy McQuire, he spotted a car matching the description less than ½ mile from the scene of the attempted burglary. Capt. Jackson said that there were two men in the car and that both were taken into custody and interviewed. Before the two men were taken into custody Paul identified them as two of the individuals who attempted to burglarize Jenkins's residence.

"After the two men were taken into custody and interviewed, the names of the two remaining suspects were disclosed. Eventually all four men, including Stanford, were interviewed. Capt. Jackson testified that the four men each said that they had attempted to break in to Jenkins's apartment to steal marijuana. Capt. Jackson established that he had had no contact with Stanford before Stanford's arrest in this case. Capt. Jackson testified that, after reviewing the statements of the suspects, he prepared an affidavit to support the request for a search warrant. Before he applied to the court for the warrant, Capt. Jackson said that he and other officers verified the identity of the individual whom one of the suspects identified as 'Wayne' by running a license-plate check through law-enforcement databases with the license number on the automobile parked in front of the residence. That exercise revealed that the owner of the automobile was Wayne

> Lamar Jenkins. In addition, officers contacted the landlord of the apartment complex, and that individual verified that the apartment was leased to Wayne Lamar Jenkins. Capt. Jackson added that during the course of the investigation, a criminal-background check was conducted, which revealed that Jenkins had had a prior drug arrest in Russell County in 1979.
>
> "Capt. Jackson went to Jenkins's apartment and conducted the search. During the search, Jenkins was present on the porch of the apartment with other officers. After the search concluded, Capt. Jackson interviewed Jenkins inside the apartment. Jenkins was advised of his *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),] rights. After he waived his rights, Jenkins gave a statement in which he admitted selling marijuana from his apartment."

Jenkins contends that the search warrant, which did not specifically mention marijuana, was unconstitutionally broad. He contends that the Court of Criminal Appeals' decision conflicts with its prior decisions in *Palmer v. State*, 426 So.2d 950, 952 (Ala.Crim.App.1983), and *Peavy v. State*, 336 So.2d 199 (Ala.Crim.App.1976).

Jenkins relies in part on the following discussion in *Palmer*, 426 So.2d at 952:

> "Although Ingram stated that his informant had only observed cocaine in the defendant's residence, the warrant authorized a search

> for 'cocaine, . . . or any other illegal substances as described under the provisions of the Alabama Uniform Controlled Substances Act.' The defendant argues that this improperly authorized a 'general exploratory search.'
>
> ". . . .
>
> "The fact that there was no probable cause to believe that other controlled substances were within the defendant's residence does not taint the entire warrant so that nothing seized during the course of the execution of the warrant was admissible. That part of the warrant authorizing a search for 'any other illegal substance,' although invalid because not based on probable cause, was severable from that portion of the warrant which authorized a search for cocaine."

Among other things, Jenkins also quotes the following from *Peavy,* 336 So.2d at 202:

> "The Fourth Amendment's requirement that a warrant particularly describe the place to be searched and the things to be seized makes general searches impossible and prevents seizure of one thing under a warrant describing another and nothing is left to the discretion of the officer executing the warrant as to what is to be taken. The search warrant in this case is a dragnet instrument and cannot pass Constitutional muster."

The Fourth Amendment to the United States Constitution provides, in pertinent part, that a

warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." In its brief to this Court, the State argues as follows:

> "General warrants or general searches are prohibited by the Fourth Amendment, '[t]he problem [posed] by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a persons belongings.' *Adresen v. Maryland,* 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Again, while the warrant could have been more carefully worded, when reading it in a common sense fashion, in light of the knowledge of Captain Van Jackson who applied for the warrant, it is clear that the clause in the warrant was sufficiently specific and did not allow for a general, exploratory search of Jenkins's apartment and belongings."

The State then discusses a decision of the Supreme Court of Montana and a decision of the South Carolina Supreme Court:

> "In a similar case, the Supreme Court of Montana held:
>
> "'The appellant next argues that the search warrant is deficient because it described the items to be searched for as "drugs and drug paraphernalia." It is the appellant's position that such language is overly broad and could be interpreted to include legal drugs such as aspirin and alcohol.
>
> "'We agree that "drugs and drug paraphernalia" is not the ideal language to use in

describing particular items to be searched for in a warrant. Nonetheless, under the circumstances of this case, we find such language to be an adequate description of the items to be seized. Section 46-5-201, MCA, requires that a search warrant particularly describe "the thing, place, or person to be searched and the instruments, articles, or things to be seized." The search warrant in question describes the place to be searched as Broell's 1976 green Camaro, and the things to be seized as "certain items which are contraband/evidence/fruits of the crime . . . and are particularly described as being drugs and drug paraphernalia." Moreover, the application for the search warrant reinforces the intended meaning of "drugs and drug paraphernalia" as used in the search warrant. The application states that

"'"'[T]he offense of felony possession of dangerous drugs has been committed and . . . in the defendant's car . . . there are now located certain items which are contraband/evidence/fruits of the crime/instrumentalities and articles used in the commission of a crime and are particularly described as being drugs and drug paraphernalia."

"'. . . .

"'Upon reviewing the search warrant and the application together, the fact that Officer Frederick was to search for and seize *illegal* drugs is inescapable. The appellant's contention, that in order to constitute probable

> cause to search, an officer ought to be able to identify what type or types of illegal contraband the officer expects to find, is unsound. As the state points out, no police officer can anticipate what specific wares a suspected drug dealer will possess at any given time.
>
> "' . . . .'
>
> "*State v. Broell,* [249 Mont. 117, 121-22,] 814 P.2d 44, 46-47 (Mont.1991). . . .[2]
>
> " . . . Further, in the case of illegal drugs, they are readily distinguishable from legal items, and thus, the risk that officers executing the warrant might seize other items

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[2] Justice See contends in his dissenting opinion that *Broell* is inapposite in light of the decision of the United States Supreme Court in *Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). *Groh,* however, is distinguishable. The application described the objects to be searched for in *Groh* as

> "'any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.'"

540 U.S. at 554. In the warrant, however,

> "in the space set aside for a description of the items to be seized, [it was] stated that the items consisted of a 'single dwelling residence . . . blue in color.' In other words, the warrant did not describe the items to be seized *at all.*"

540 U.S. at 558.

> in addition to the contraband does not exist. Further, since an officer could search in all the same places whether the warrant specified a search for 'marijuana' or 'illegal drugs' or 'drugs' or any other similar term, the warrant in this case does not increase the likelihood of an unauthorized rummaging through Jenkins's personal effects. *See State v. Williams,* [297 S.C. 404, 406-08,] 377 S.E.2d 308, [309-10] (S.C.1989)."

(Emphasis added.)

Common sense and experience suggest that there is merit in the State's argument. Among other things, it is difficult to understand how, in the circumstances presented here, a warrant worded in the manner the warrant at issue here is worded could result in an unreasonable "rummaging," since, as the Supreme Court of South Carolina reasoned, marijuana and other illicit drugs would naturally be located in the same types of places. The Court of Criminal Appeals explained in *Palmer,* 426 So.2d at 952, that that case did not present a

> "situation where the other substances were discovered after the particularly described property in the warrant had been found, for the reasons that the police did not know how much cocaine they were searching for or that it would be located in one specific area and because other controlled substances would naturally be found in places where the cocaine would be located."

Thus, where the police do not know "how much [of a specific substance] they [are] searching for" or whether the substance will be "located in one specific area,"[3] the invasion of a suspect's privacy resulting from the *search* itself is no greater in a search conducted pursuant to a warrant naming illicit drugs generally as the object of the search than in a search conducted pursuant to a warrant that specifically names marijuana as the object of the search.[4]

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[3] The quoted conditions are in accord with those contemplated by the following statement in one well-respected treatise: "[I]t has been held that evidence is admissible . . . where the description is too general in the probable cause sense but yet *did not broaden the intensity or length of the search.*" Wayne R. LaFave, *Search and Seizure* § 4.6(f) n. 148 (4th ed.2004) (emphasis added).

[4] Further, although our analysis does not depend on the use of the "plain view" doctrine, it also may be noted that the invasion of a suspect's privacy that results from a *seizure* of his personal property likewise is no different in the two searches, given the fact that the locations in which the authorities may search will be the same.

> "Since the police had a valid warrant to search for one controlled substance in the defendant's residence, they could properly seize any other article of incriminating character, including other controlled substances, they inadvertently came across in the course of the search. '[I]t is generally the rule that when officers in the course of a bona fide effort to execute a search warrant for narcotics or dangerous drugs discover articles which although not included in the warrant are reasonably identifiable as contraband, they may seize them whether they are in plain sight or come into plain sight subsequently as a result of

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At least given the above-quoted conditions, we are unable to conclude that the search and seizure at issue in the present case ran afoul of the Fourth Amendment prohibition against unreasonable searches and seizures. More specifically, we cannot conclude that the Court of Criminal Appeals erred in concluding that the search conducted in the present case was *not* a "general exploratory search" in violation of the Fourth Amendment requirement that a warrant "particularly describ[e] . . . things to be seized."

The result reached by the Court of Criminal Appeals in this case was not foreclosed by its decision in *Palmer.* Indeed, the Court of Criminal Appeals quoted *Palmer* for the proposition that """if the purpose is to seize not a specific property, but any property of a specified character, which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and it may be described generally as to its nature or character.""" *Jenkins,* ___ So.2d at ___ (quoting *Palmer v. State,* 426 So.2d at 952). Further, under the conditions extant here, we agree with the argument made by the State to the Court of Criminal Appeals

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the officers' effort.' 28 C.J.S. Drugs And Narcotics Supplement, Section 138 (1974)."

Palmer, 426 So.2d at 952-53 (citation omitted). But, of course, in the present case, the police did not even go this far. The drug specifically mentioned in the supporting affidavit was marijuana; that was the only drug seized and the only drug in relation to which Jenkins was convicted.

that the holding in *Palmer* is "essentially identical" to the holding of the Court of Criminal Appeals in the present case – *at least in terms of its functional effect. See* note 4, *supra* (discussing the operation of the plain-view doctrine). Moreover, the conclusion in *Palmer* as to the invalidity of the authorization in the warrant to search for "other illegal substances" appears to be dictum. The "other illegal substances" discovered in the course of the police search for cocaine in *Palmer* were admissible in that case in any event under the plain-view doctrine. *Palmer,* 426 So.2d at 952-53. Thus it was unnecessary for the Court of Criminal Appeals to have decided the constitutionality of the "other illegal substances" language in the warrant.[5]

Nor does *Peavy v. State* present an obstacle to the result reached below. The fact that the outcomes in the two cases were different, even though the warrants in the two cases contained similar language, is not enough. What must be determined is whether the *holding* in *Peavy* conflicts with the *holding* of the Court of Criminal Appeals in the present case. That, in turn, depends on whether the legal question as framed by, and as presented to and answered by, the Court of Criminal Appeals in the present case was the

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[5] As an aside, we note that the Court of Criminal Appeals' conclusion in *Palmer* as to the unconstitutionality of the "other illegal substances" language is contrary to substantial authority from other jurisdictions discussed *infra*.

same as, or was narrower than, the legal question answered by that court in *Peavy*. It was narrower.

In *Peavy*, the supporting affidavit used the term "controlled substances" in describing the object of the search. 336 So.2d at 200. The warrant in *Peavy* referred to the object of the search using exactly the same term, "controlled substances." *Id.* The warrant described the place to be searched, however, as "the person of each and every person present in or near [a particular] mobile home and any mobile vehicle adjacent to said mobile home." 336 So.2d at 201. The case arose from the seizure of a single amphetamine pill from the dashboard of an automobile that did not belong to the owner of the mobile home identified in the search warrant but that was parked near that mobile home.

Despite the use of the same term in describing the object of the search in the affidavit and in the warrant, the court in *Peavy* began its very brief – indeed, conclusory – analysis with the observation that the search warrant in that case was a "complete departure" from the supporting affidavit. The court took note of the requirements of the Fourth Amendment as to the need for specific descriptions of both the thing to be seized and the place to be searched. It thereafter concluded that the warrant in that case was a "dragnet instrument" that did not pass constitutional muster. 336 So.2d at 202.

In the present case, Jenkins did not present any argument to the trial court to the effect that the

language of the warrant was unconstitutionally broad in respect to (1) the description of the object of the search, (2) the description of the place to be searched, or (3) the two descriptions taken together or the totality of the warrant. The trial court, apparently ex mero motu, held the language of the warrant to be overly broad, but only in one of these three respects. Specifically, the trial court held that the language in the warrant describing the object of the search was so lacking in specificity that that language, by itself, caused the warrant as a whole to fail. Indeed, the trial court examined the "location to be searched" language in the warrant and specifically found it to be in compliance with the requirements of the Fourth Amendment.

On appeal to the Court of Criminal Appeals, the State argued that the language of the warrant describing the object of the search was not broader than permitted by the Fourth Amendment. In response, Jenkins argued, for the first time, that the description of the object of the search was unconstitutional. That was the limit of the position that Jenkins asked the appellate court to adopt. He did not argue that the language in the warrant describing the place to be searched contributed to the unconstitutionality of the warrant.

The Court of Criminal Appeals responded to the holding of the trial court and to the question framed for it by the parties by holding that the language describing the object of the search was not so lacking in specificity as to cause the warrant to fail. The

holding of the Court of Criminal Appeals, like the holding of the trial court, was limited to that question.

In contrast, the holding in *Peavy* clearly addressed more than simply the description of the object to be searched. As noted, although the supporting affidavit and the warrant both described the object of the search as "controlled substances," the court in *Peavy* began its analysis with the criticism that the language of the warrant represented a "complete departure" from its supporting affidavit. It then went on to hold that the warrant constituted an unconstitutional "dragnet instrument." Clearly, *Peavy* does not stand for the proposition that the use of a term such as "controlled substances" in a warrant to describe the object of the search is sufficient, in and of itself, to invalidate that warrant. The holding in *Peavy,* therefore, does not conflict with the narrower, converse holding by the Court of Criminal Appeals in the present case.

Moving beyond the issue whether the Court of Criminal Appeals' decision conflicts with *Palmer* and *Peavy,* the substantive question ultimately presented in this case is as follows: Is the description in the warrant of the object of the search – "[a]ny/all drugs, contraban[d] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, [sale], and/or storage of these type items" – so lacking in specificity as to cause the

warrant to be constitutionally defective?[6] We conclude it is not.

Although there is some authority suggesting a different analysis, *see, e.g., State v. Casey,* (No. 03-MA-159, Oct. 24, 2004) (Ohio App.2004) (not reported in N.E.2d); *United States v. Morris,* 977 F.2d 677 (1st Cir.1992), a significant number of courts that have addressed the issue likewise have answered questions such as this in the negative. In so doing, they have offered analysis and announced holdings consistent with those provided by the decisions of Montana and South Carolina cited by the State.[7]

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[6] Although Jenkins argues that the reference to "[a]ny/all drugs" in the warrant is even broader than the "reference to 'controlled substances' in *Peavy,*" under the circumstances presented and in light of the full description of the object of the search as quoted in the text, that description – "[a]ny/all drugs" – can reasonably be read only as authorizing the search for illegal drugs and related paraphernalia.

[7] Justice Woodall's dissent criticizes the State, and by extension this opinion, for reliance on what it describes as an "argument" made for the first time to this Court. Specifically, the dissent notes that the State argues that " 'since an officer could search in all the same places whether the warrant specified a search for "marijuana" or "illegal drugs" or "drugs" or any similar term, the warrant in this case does not increase the likelihood of an unauthorized rummaging through Jenkins's personal effects.' State's brief, at 21-22." ___ So.2d at ___. The dissent asserts that this argument, not having been made by the State in its brief to the Court of Criminal Appeals, comes too late. The dissent relies in this regard on the proposition stated in *Avis Rent A Car Systems, Inc. v. Heilman,* 876 So.2d 1111,

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1124 n. 8 (Ala.2003), that "'[a]n argument not made on appeal is abandoned or waived.'" ___ So.2d at ___.

Properly viewed, however, the rule upon which the dissent attempts to rely is one that generally prevents an appellant from raising on appeal a *question* or *theory* that has not been preserved for appellate review, not the provision to a higher court of an additional *specific reason* or *authority* for a theory or position asserted by the party in the lower court. The fundamental rule in this regard, as stated in *Corpus Juris Secundum*, is that a "higher court normally will not consider a *question* which the intermediate court could not consider." 5 C.J.S. *Appeal and Error* § 977 (2007). However, "[a]lthough on appeal from an intermediate court the higher court may be limited to the *questions of law* raised or argued at the trial, it is not limited to the *arguments* there presented." 5 C.J.S. *Appeal and Error* § 978 (2007) (emphasis added). In other words, "[n]ew *arguments or authorities* may be presented on appeal, although no new *questions* can be raised." 4 C.J.S. *Appeal and Error* § 297 (emphasis added).

In *Kerbs v. California Eastern Airways, Inc.*, 33 Del.Ch. 69, 80, 90 A.2d 652, 659 (1952), for example, the court put it this way:

> "It should be noted that the plaintiffs did not call Section 9 of the General Corporation Law to the [trial court's] attention, but argued solely that the presence of interested directors could not be ignored in determining whether the plan received a majority favorable vote at the Board's meeting. While the plaintiffs did not urge this *precise reason* for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an *entirely new theory* of his case, but when the argument is merely *an additional reason* in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered. We think the

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> point falls within the class of additional reasons supporting the plaintiffs' theory."

(Emphasis added.) *See also Board of Comm'rs of Orleans Levee Dist. v. Shushan*, 197 La. 598, 611, 2 So.2d 35, 39-40 (1941) ("The rule [that an appellate court will not consider, for the first time, matters not raised in the court of original jurisdiction] has reference only to controversies arising under the pleadings or the evidence and not to contentions urged in the argument of counsel. The Supreme Court decides a case on the issues presented by the pleadings or the evidence, and not on the argument of counsel in the court below, or even on the reasons assigned by the trial judge.").

In the earlier case of *Persky v. Bank of America National Ass'n*, 261 N.Y. 212, 185 N.E. 77 (1933), the Court began by noting that

> "'it is well settled that this court will not, for the purpose of reversing a judgment, entertain *questions* not raised or argued at the trial, or *upon the intermediate appeal*.'"

261 N.Y. at 217, 185 N.E. at 79 (quoting *Martin v. Home Bank*, 160 N.Y. 190, 199, 54 N.E. 717 (1899) (emphasis added)). The court thereafter explained that this rule was not applicable in the case before it:

> "In our review we are confined to the *questions* raised or argued at the trial but not to the *arguments* there presented. '*Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such judgment as they ought to have given.*' (*Oneida Bank v. Ontario Bank*, 21 N.Y. 490, 504 [(1860)].)"

261 N.Y. at 218, 185 N.E. at 79 (all but first emphasis added).

The foregoing principles have been recognized in Alabama cases. Although not dealing with the precise appellate review issue presented here, the case of *Blue Cross & Blue Shield of Alabama v. Hodurski*, 899 So.2d 949, 960 (Ala.2004), addressed

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the possibility of a litigant "miscalculat[ing] the applicability of the appropriate rule of law." The Court cited *Williams-Guice v. Board of Education of Chicago,* 45 F.3d 161, 164 (7th Cir.1995), for the proposition that

> "'litigants' failure to address the legal question from the right perspective does not render [the appellate court] powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances.'"

Also in *Hodurski,* this Court quoted with approval from another federal decision:

> "'"'Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.'"'"

Hodurski, 899 So.2d at 960 (quoting *Forshey v. Principi,* 284 F.3d 1335, 1357 n. 20 (Fed.Cir.), *cert. denied,* 537 U.S. 823, 123 S.Ct. 110, 154 L.Ed.2d 33 (2002), quoting in turn *Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir.1972)).

In *Home Indemnity Co. v. Reed Equipment Co.,* 381 So.2d 45, 50 (Ala.1980), the Court explained that "[t]he rule requiring adherence to the *theory* relied on below . . . does not mean the parties are limited in the appellate court to the same *reasons* or arguments advanced in the lower court upon the matter or *question in issue.* 5 Am.Jur.2d, *Appeal and Error,* § 546 at 32." (Emphasis added), relied upon in *Associated Gen. Contractors Workers Compensation Self-Ins. Fund v. Williams,* 982 So.2d 557 (Ala.Civ.App.2007). *See also Alabama Medicaid Agency v. Beverly Enters.*, 521 So.2d 1329, 1333 (Ala.Civ.App.1997) (apparently stating the general rule discussed above, albeit using different terminology, namely "that an appellant may present

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In *State v. Olsen,* 32 Wash.App. 555, 648 P.2d 476 (1982),

> "[a] deputy sheriff applied for and obtained a warrant authorizing a search of the defendant's residence. The Affidavit for Search Warrant stated that a reliable confidential informant had *'seen a quantity of controlled substance to wit marijuana' therein.* A search warrant was issued authorizing a search for *'all illicit drugs and controlled substances.'* Pursuant to the warrant, defendant's residence was searched and, as charged in the information, opium, cocaine and phenobarbital, all of which are controlled substances, were found therein."

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new theories in support of its *position* for the first time on appeal" (emphasis added)).

In the present case, the question whether the language of the warrant describing the object of the search was specific enough to satisfy the "thing-to-be-seized" requirement within the so-called "particularity clause" of the Fourth Amendment to the United States Constitution has existed throughout. In response to a motion to suppress, the trial court decided this issue against the State and in favor of Jenkins. The trial court's order analyzed the issue in-depth and concluded that the language of the warrant did not satisfy the particularity clause of the Fourth Amendment. The State timely sought review of this order in the Court of Criminal Appeals pursuant to Rule 15.7(a), Ala. R.Crim. P., maintaining that the trial court had erred in its ruling against the State on this issue. The State, by its citation to this Court of the Montana and South Carolina Supreme Court cases quoted in the text, is simply giving this Court the benefit of an additional "precise reason" and authority as to why, as a matter of law, the trial court wrongly decided this issue.

32 Wash.App. at 556, 648 P.2d at 477 (emphasis added). The trial court denied the defendant's motion to suppress based on the alleged failure of the warrant to satisfy the particularity requirement of the Fourth Amendment to the United States Constitution. On appeal, the Washington Court of Appeals affirmed, stating, in part:

> "The requirements of particularity are met if the substance to be seized is described with '*reasonable particularity*' which, in turn, is to be *evaluated in light of 'the rules of practicality, necessity and common sense.' State v. Withers,* 8 Wash.App. 123, 126, 504 P.2d 1151 (1972). . . .
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> " . . . .
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> " . . . [T]here was no reasonable likelihood that a violation of the defendant's rights would occur. The presence of marijuana in a private residence raises a legitimate inference that marijuana may be present throughout the residence. . . . Therefore, *as a practical matter, the language used in the warrant in the present case could not have expanded the scope of a search for marijuana because, in searching for marijuana, the officers were authorized to inspect virtually every aspect of the premises.* Any other contraband inadvertently found in the course of such lawful search would clearly be subject to seizure pursuant to the 'plain view' doctrine."

Olson, 32 Wash.App. at 557-59, 648 P.2d at 478-79 (some citations omitted; emphasis added).

The Supreme Court of Florida offered the following analysis in *Carlton v. State,* 449 So.2d 250 (Fla.1984):

> "The [lower appellate court] noted that the description requirements of the United States and Florida Constitutions 'must be given a reasonable interpretation consistent with the type or character of the property sought.' . . . The [lower appellate] court quoted from a federal district court decision . . . for the proposition that a looser description is allowable where the property to be seized is not innocuous but is 'prima facie contraband.' . . .
>
> ". . . .
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> " . . . We simply cannot uphold the argument that the validity of a search warrant should depend, in large part, on whether the issuing magistrate had the ability and information to describe the property with a greater degree of particularity than he did. A valid warrant is always based on an affidavit which particularly describes the place to be searched and the person and thing to be seized. § 933.05, Fla. Stat. (1981).
>
> "The particularity requirement of warrants has a two-fold purpose. Perhaps the most frequently quoted statement in this regard is that of Justice Butler in *Marron v. United*

States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927):

"'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible *and* prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'

". . . .

" . . . We fail to see how justice is being furthered by mandating that a warrant specify *which* particular controlled substance is to be seized. In most instances where . . . probable cause exists to suspect [an] individual of possessing and/or trafficking in a controlled substance, there is a high probability that the offense involves more than one particular controlled substance. We do not believe that a valid purpose is being served by requiring our law enforcement personnel to name each particular substance rather than the term 'controlled substances.' We do not think this is such a general term that it allows for abuse and unbridled discretion by law enforcement personnel or allows for a 'general search' as that term is used in prior United States Supreme Court or Florida decisions. To hold otherwise would hamper law enforcement unjustifiably."

449 So.2d at 251-52. *See also United States v. Horne,* 198 Fed.Appx. 865, 871 (11th Cir.2006) (holding that

a warrant authorizing a search of a house for "drugs" and "drug paraphernalia," based on a supporting affidavit attesting to the purchase of "nine pieces of rock cocaine," satisfied the United States Constitution's Fourth Amendment requirement for a search warrant to "'particularly describ[e]' ' "'the person or things to be seized.' *U.S. Const. Amend. IV.* . . .").

In *State v. Stromberg,* 783 P.2d 54, 58 (Utah Ct.App.1989), an informant's affidavit stated that the informant had seen "marijuana pipes" in the defendant's house and that the informant had observed the defendant smoking marijuana in his home on three or four occasions. A warrant authorizing a search for "controlled substances" and "drug paraphernalia" was held to pass constitutional muster:

> "The warrant merely specified controlled substances and drug paraphernalia. We are not persuaded that this description is so broad as to offend the fourth amendment's prohibition against warrants not 'particularly describing the . . . things to be seized.' *See U.S. Const. amend. IV.* The trial court determined that there was a reasonable inference from the affidavit that controlled substances and paraphernalia, other than marijuana and marijuana pipes, would be found in defendant's home. Even if this inference were erroneous, generic descriptions of property, although not favored, have been held permissible in cases involving contraband. See *State v. Gallegos,* 712 P.2d 207, 209 (Utah 1985)."

As the United States Court of Appeals for the Fourth Circuit stated in *United States v. Ladd,* 704 F.2d 134, 136 (4th Cir.1983):

> "'[T]he test for the necessary particularity is a pragmatic one. The degree of specificity required may necessarily vary according to the circumstances and type of items involved. . . . There is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of the items to be seized.'
>
> "*United States v. Torch,* 609 F.2d 1088, 1090 (4th Cir.), *cert. denied,* 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1979) (citations omitted).
>
> "The instant warrant fully satisfies the particularity requirement. The items to be seized were limited to those relating to 'the smuggling, packing, distribution and use of controlled substances.' More specificity is not required by the Constitution."

In light of the foregoing, we affirm the judgment of the Court of Criminal Appeals reversing the trial court's order suppressing the evidence at issue. To repeat the conclusion of the Supreme Court of Florida in *Carlton,* we should take care not to "hamper law enforcement unjustifiably."

AFFIRMED.

STUART, SMITH, BOLIN, and PARKER, JJ., concur.

SEE, LYONS, and WOODALL, JJ., dissent.

COBB, C.J., recuses herself.

SEE, Justice (dissenting).

I respectfully dissent, and I join Justice Woodall's dissent.[8] I write specially to address certain issues raised in the main opinion.

The Lee County Sheriff's Department received information indicating that Wayne Lamar Jenkins had marijuana in his apartment. The sheriff's department obtained a search warrant based on an affidavit stating that Jenkins was in possession of marijuana. The warrant, however, did not mention marijuana; instead, it authorized a search of "[a]ny/all vehicles, people, or buildings located on or within the [curtilage] of [Jenkins's] residence" for "[a]ny/all drugs, contraban[d] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, [sale], and/or storage of these type items."

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[8] As explained herein, I agree with Justice Woodall that the language in the warrant at issue here distinguishes this case from *Palmer v. State*, 426 So.2d 950, 952 (Ala.Crim.App.1983). I also agree with Justice Woodall that the warrant in this case is unconstitutionally broad and that, therefore, this case conflicts with *Peavy v. State*, 336 So.2d 199, 202 (Ala.Crim.App.1976).

Apparently as a result of the search, Jenkins was indicted for trafficking in marijuana, a violation of § 13A-12-231(1), Ala.Code 1975. Jenkins moved to suppress the evidence of the marijuana and other evidence obtained pursuant to what he contended was an unlawful search warrant. The trial court held a hearing on the motion and suppressed the evidence because the search warrant was not supported by probable cause and, therefore, authorized an unconstitutional, general, exploratory search of Jenkins's residence. The State appealed from the trial court's order that granted Jenkins's motion to suppress. See Rule 15.7(a), Ala. R.Crim. P.

The Court of Criminal Appeals reversed the trial court's suppression order. *State v. Jenkins,* [Ms. CR-05-1833, May 25, 2007] ___ So.2d ___ (Ala.Crim.App.2007). Despite the fact that "the search warrant contained the general term 'drugs' rather than a more specific designation 'marijuana,"' ___ So.2d at ___, the plurality opinion of the Court of Criminal Appeals held that the search warrant was supported by probable cause and that "the search warrant sufficiently described that law-enforcement officers were authorized to search for illicit drugs, which would include, but not be limited to, marijuana. Thus, the search was lawful, and the trial court erred when it granted Jenkins's motion to suppress." *Jenkins,* ___ So.2d at ___.

"The Fourth Amendment [to the Constitution of the United States] unambiguously states that 'no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."' *Groh v. Ramirez,* 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (emphasis omitted). "The Fourth Amendment's requirement that a warrant particularly describe . . . the things to be seized makes general searches impossible and prevents seizure of one thing under a warrant describing another and nothing is left to the discretion of the officer executing the warrant as to what is to be taken." *Peavy v. State,* 336 So.2d 199, 202 (Ala.Crim.App.1976). Jenkins argues that the warrant in this case violates "[t]he specific command of the Fourth Amendment to the Constitution of the United States . . . that no warrants shall issue except those 'particularly describing the . . . things to be seized."' *Palmer v. State,* 426 So.2d 950, 952 (Ala.Crim.App.1983).

In *Peavy,* police executed a search warrant authorizing a search for "[a]ny controlled substances prohibited by the laws of the State of Alabama." 336 So.2d at 201. The warrant was based upon an affidavit that averred that "there [were] controlled substances" at a certain mobile home. 336 So.2d at 200-01. No other statement was contained in the affidavit or the warrant that further specified the items to be searched for or seized. During the search, police found a single amphetamine pill on the dashboard of Peavy's car, which was parked outside the mobile home. The trial court denied Peavy's motion to suppress the evidence of the pill, and he

appealed to the Court of Criminal Appeals. That court stated that "[b]y its very language [the warrant] authorize [d] a general exploratory search. General exploratory searches are forbidden by Federal and State courts alike." 336 So.2d at 202 (citations omitted). The Court of Criminal Appeals reversed the trial court's ruling, holding that "[t]he search warrant in this case is a dragnet instrument and cannot pass Constitutional muster." 336 So.2d at 202.

In the case before us, the warrant to search Jenkins's apartment authorized a search for "[a]ny/all drugs, contraban[d] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, [sale], and/or storage of these type items." There is little to distinguish the warrant in this case from the one in *Peavy,* except that the warrant in *Peavy* expressly states that only "controlled substances" are to be searched for.

In *Palmer,* an informant told police that he had seen a large amount of cocaine at Palmer's residence. The warrant that was issued authorized a search for "cocaine, . . . or any other illegal substances as described under the provisions of the Alabama Uniform Controlled Substances Act." 426 So.2d at 952. Palmer argued that the warrant authorized a "'general exploratory search."' 426 So.2d at 952. The Court of Criminal Appeals first noted that "a less precise description is required of property which is, because of its particular character, contraband." 426 So.2d at 952. Nevertheless, the Court of Criminal Appeals held that the informant's testimony that one specific

drug was in Palmer's residence did not give rise to probable cause to support the portion of the warrant authorizing a search for controlled substances in general. However,

> "[t]he fact that there was no probable cause to believe that other controlled substances were within the defendant's residence does not taint the entire warrant so that nothing seized during the course of the execution of the warrant was admissible. That part of the warrant authorizing a search for 'any other illegal substance', although invalid because not based on probable cause, was severable from that portion of the warrant which authorized a search for cocaine."

426 So.2d at 952.

In this case, there was similarly no probable cause to believe that there were drugs other than marijuana in Jenkins's apartment; therefore, as in *Palmer,* the part of the warrant authorizing a search for any and all "drugs [and] contraban[d]" was invalid. However, unlike *Palmer,* in this case, there was no specific item, i.e., marijuana, mentioned in the warrant for which probable cause existed. The Supreme Court of the United States has "clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh v. Ramirez,* 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

In reaching its decision that the warrant in this case was not unconstitutionally broad, the main opinion relies on several cases decided by various federal and state appellate courts. Reliance on those cases, however, is misplaced. The warrants in those cases generally specified that the object of the search was illegal drugs, illicit drugs, controlled substances, or some other term that denotes illegal drugs, i.e., drugs the possession of which is prohibited by law.[9] The search warrant in Jenkins's case authorized a search for "[a]ny/all drugs, contraban[d]" or for anything that is related to either of them.[10]

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[9] *See United States v. Ladd*, 704 F.2d 134, 136 (4th Cir.1983) (warrant authorizing a search for items related to "'smuggling, packing, distribution and use of controlled substances"'); *Carlton v. State*, 449 So.2d 250, 250 (Fla.1984) (warrant authorizing a search for "all controlled substances" and other items relating to the sale or possession of controlled substances in violation of Florida law); *State v. Williams*, 297 S.C. 404, 407, 377 S.E.2d 308, 310 (1989) (warrant authorizing a search for "any illegal drugs"); *State v. Stromberg*, 783 P.2d 54, 55 (Utah Ct.App.1989) (warrant authorizing search for "controlled substances" and "drug paraphernalia"); *State v. Olson*, 32 Wash.App. 555, 556, 648 P.2d 476, 477 (1982) (warrant authorizing a search for "all illicit drugs and controlled substances").

[10] It could be argued that listing "contraban[d]" as an object of the search specifies that the purpose of the search was to find and seize illegal drugs. However, this argument would be problematic because "[a]ny/all drugs" is separated from the word "contraban[d]" by a comma, and, therefore, "contraban[d]" cannot be read to describe the term "[a]ny/all drugs." In fact, the listing of "contraban[d]" as a separate and independent object of the search would allow law enforcement executing the search

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The following phrases have been held to be sufficiently descriptive to satisfy the particularity requirement of the Fourth Amendment: "'narcotic drugs'; 'any illegal drugs'; 'marijuana, dangerous drugs, stimulant drugs, and hallucinogens'; 'controlled substances'; and 'narcotics, dangerous drugs, and narcotics paraphernalia.'" 2 Wayne R. LaFave, *Search and Seizure* § 4.6(b) (3d ed.1996). However, LaFave goes on to note that "a more general reference to items which are contraband in nature but without even identifying their type is insufficient." *Id.* The search warrant in this case suffers from that precise deficiency. It specifies a class of items as the object of the search, namely, drugs, but it fails to specify whether that object is illegal. Moreover, when the warrant does mention contraband it fails to specify the type of contraband that is the object of the search. A warrant authorizing a search for any illegal object or item is unconstitutionally broad. *See United States v. Morris,* 977 F.2d 677, 682 (1st Cir.1992) (noting that a warrant containing "the catch-all phrase authorizing seizure of 'any other object in violation of the law' is impermissibly broad").

The main opinion cites two cases, *United States v. Horne,* 198 Fed.Appx. 865, 871 (11th Cir.2006), and *State v. Broell,* 249 Mont. 117, 814 P.2d 44 (1991), in which, it claims, a warrant authorizing a search for

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warrant to search for and seize virtually any illegal item or substance – be it a drug or not.

"drugs and drug paraphernalia" was held as sufficiently descriptive for Fourth Amendment purposes. I am not convinced. The description of the warrant provided by the court in *Horne* is factually ambiguous. At one point, the United States Court of Appeals for the Eleventh Circuit stated that the warrant "limited the search to drugs and drug paraphernalia"; however, the court previously in the opinion had indicated that the search warrant permitted the police to search for "illegal drugs, drug money, and any other drug or drug trafficking paraphernalia." 198 Fed.Appx. at 871, 867.

In *Broell* the Supreme Court of Montana held that the search warrant authorizing a search for "drugs and drug paraphernalia" was valid when it was read in conjunction with the application for the warrant. The Supreme Court of Montana stated that "when the application [for the search warrant] is signed by the officer who is named in the search warrant and it is that officer who personally serves such warrant, the documents are construed together to determine whether the requirement of particularity describing the thing to be seized has been met." *Broell,* 249 Mont. at 122, 814 P.2d at 47. The court concluded that "reviewing the search warrant and the application together, the fact that Officer Frederick was to search for and seize *illegal* drugs is inescapable." *Id.*

The facts in the case before us are similar to those in *Broell*; however, the Supreme Court of the United States in *Groh v. Ramirez*, supra, appears to

have rejected the principle adopted by the Supreme Court of Montana that the warrant may be read together with the application for the warrant in order to determine the scope of the warrant. In *Groh,* a federal agent prepared and signed an application for a search warrant, listing as the items to be seized "'any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."' *Groh,* 540 U.S. at 554. The warrant was issued, but it failed to identify any of the items that were mentioned in the affidavit. The agent who obtained the warrant led the team that conducted the search. The search uncovered no illegal weapons or explosives. *Groh,* 540 U.S. at 555. Even though the federal agent who signed the application executed the search warrant, the Supreme Court held that "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." The Supreme Court noted that it is the warrant that "requires particularity" and not "the supporting documents." 540 U.S. at 557.[11] Thus, *Broell,* too, is inapposite.

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[11] The Supreme Court in *Groh* does allow for a warrant to refer to other documents in order to satisfy the particularity requirement if "the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh,* 540 U.S. 557-58. In his reply brief, Jenkins points out that "[t]here is no clear record the affidavit was attached to

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Neither this Court nor the Supreme Court of the United States has directly addressed whether a warrant is unconstitutionally overbroad when the affidavit that supports it specifies only that marijuana is suspected, but the warrant authorizes a search for "[a]ny/all drugs" and contraband. The Supreme Court of the United States has stated, however, that

> "unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."

Groh, 540 U.S. at 560.

I agree with the main opinion that we must recognize the realities law enforcement faces. *See Ex*

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clarify any alleged ambiguity [in the warrant], and, although Deputy Jackson was present during the execution of the warrant, there is no record he explained the contents of the affidavit to the other officers and gave them an opportunity to read it." Jenkins's reply brief at 7. Therefore, it would appear that Jenkins has met his burden under *Groh* of proving that the search warrant was invalid, even if *Groh* implicitly requires the defendant to prove the nonexistence of incorporation of extrinsic materials. *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.2(b) (3d ed.1996) (stating that "if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution").

parte Warren, 783 So.2d 86, 96 (Ala.2000) (See, J., concurring in the result) ("The assessment of probable cause turns on the weighing of probabilities in particular factual contexts, and it requires that the collected evidence 'be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.' [*Illinois v. Gates,* 462 U.S. 213,] 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 [(1983)]." (citations omitted)). Where the informant's affidavit in support of the petition for the warrant identifies that a variety of illicit drugs were present, I understand that a search warrant that authorizes a search for illicit drugs, drug paraphernalia, etc., may well be justified. Here, however, the informant specified one particular substance – marijuana. The main opinion does not offer any explanation as to why law enforcement needs a warrant to search for any and all drugs and for any and all contraband, and for any and every thing that is related to them – "scales, baggies, cash, weapons, documents, etc." – when the affidavit specifically identifies marijuana as the item that is suspected to be at the site to be searched. In this case, the warrant did not merely expand the scope of the search from "marijuana" to "marijuana and other illegal drugs," but deleted any mention of marijuana, subsuming the particular thing to be seized – marijuana – into the general class "[a]ny/all drugs, contraban[d]" or related items of whatever kind, without reference to the affidavit or some explanation for the broadened scope of the search.

The practice undertaken in this case appears to violate the requirement set out in *Groh* that "particular items described in the affidavit are also [to be] set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search)." 540 U.S. at 560. *See Ex parte Tucker,* 667 So.2d 1339, 1343 (Ala.1995) ("Warrantless searches are per se unreasonable, unless they fall within a recognized exception. *Ex parte Hilley,* 484 So.2d 485 (Ala.1985). Those exceptions include objects in plain view, consensual searches, a search incident to a lawful arrest, hot pursuit or emergency situations, probable cause coupled with exigent circumstances, and a *Terry* 'stop and frisk' situation. *Daniels v. State,* 290 Ala. 316, 276 So.2d 441 (1973). Where a search is executed without a warrant, the burden falls upon the State to show that the search falls within an exception. *Kinard v. State,* 335 So.2d 924 (Ala.1976)."). None of the recognized exceptions to the prohibition against warrantless searches appears to be present or is argued in this case.

The argument that the warrant in this case does not violate the requirement of the Fourth Amendment that no warrant issue except those "particularly describing the . . . things to be seized" apparently is premised on the "no harm, no foul" principle. The main opinion concludes that law-enforcement officers could search for marijuana in every place they could search for any other controlled substance and holds that, therefore, the search warrant actually issued did not impinge on Jenkins's Fourth Amendment

right to be free of unreasonable searches or seizures.[12] However, a search for marijuana justifies a significantly different search from one for illegal possession of prescription drugs – a search for which undoubtedly would fall within the purview of a warrant to search for "[a]ny/all drugs." In such a search, the pills in the aspirin bottle may be analyzed, and the records of one's doctor and pharmacist that may be present in the area to be searched would be subject to review. Under the approach suggested by the main opinion, every affidavit testifying to the probable presence of any particular illegal drug could be expanded into a general warrant providing for an intrusion without reasonable suspicion into the personal pharmacopeia and medical records of that individual.

Finally, I read the main opinion as essentially resting on the notion that anything found during a search for "[a]ny drug, contraban[d]" would in any event have been discovered in a search for marijuana. This application of the "plain view" doctrine turns that doctrine on its head.[13] It is true that law-enforcement

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[12] Because I address and reject this proposition, it is unnecessary for me to decide whether it is a new theory, raised for the first time by the State on appeal, or an additional specific reason given in support of the State's theory. *See* ___ So.2d at ___.

[13] This Court stated in *State v. Calhoun*, 502 So.2d 808, 814 (Ala.1986):

"In *Texas v. Brown*, [460 U.S. 730, 736-37 (1985),] Justice Rehnquist, writing for the plurality, explained:

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officers engaged in an authorized search should not be required to turn a blind eye to what is in plain view. However, the argument here is that unexpected evidence of an illegal activity might be lying in plain view of a properly authorized search; therefore, the warrant can authorize a broader search than the Fourth Amendment would otherwise permit.[14] Because the first prong of the "plain view" doctrine is that "'the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area,"' *State v. Calhoun,* 502 So.2d 808, 814 (Ala.1986) (quoting *Texas v. Brown,* 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1985)), the warrant that authorized the search has to be constitutionally sound, including its

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"'In the *Coolidge [v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971),] plurality's view, the "plain view" doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. . . . Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain-view doctrine only as a pretext. . . . Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. . . ."'

[14] In turn, I presume, this broader search would offer its own expanded plain-view curtilage, thereby fueling its own expansion.

particular description of the things to be seized, before – not after – invoking the plain-view doctrine.

I respectfully dissent.

WOODALL, Justice (dissenting).

In this case, it is obvious that there was probable cause for the issuance of a warrant to search for marijuana. However, the search warrant did not mention marijuana. Instead, it authorized a search of "[a]ny/all vehicles, people, or buildings located on or within the [curtilage] of [Jenkins's] residence" for "[a]ny/all drugs, contraban[d] or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, [sale], and/or storage of these type items." It is this language that Jenkins contends is unconstitutionally broad, and I agree with him.

The Fourth Amendment to the United States Constitution provides, in pertinent part, that a warrant must "*particularly describ*[e] the place to be searched, and the persons or *things to be seized.*" (Emphasis added.) "The Fourth Amendment's requirement that a warrant particularly describe . . . the things to be seized makes general searches impossible and prevents seizure of one thing under a warrant describing another and nothing is left to the discretion of the officer executing the warrant as to what is to be taken." *Peavy v. State*, 336 So.2d 199, 202 (Ala.Crim.App.1976). Quite simply, "[t]he specific

command of the Fourth Amendment to the Constitution of the United States is that no warrants shall issue except those 'particularly describing the . . . things to be seized."' *Palmer v. State,* 426 So.2d 950, 952 (Ala.Crim.App.1983).

The plurality opinion of the Court of Criminal Appeals held that the search warrant sufficiently described the things to be seized.

> "Here, we believe that the trial court incorrectly determined that the search warrant authorized an unconstitutional 'general search' for all drugs in Jenkins's apartment. We recognize that
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> "'[g]eneral exploratory searches and seizures, with or without a warrant, can never be justified and are forbidden and condemned. *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). The specific command of the Fourth Amendment to the Constitution of the United States is that no warrants shall issue except those "particularly describing the . . . things to be seized."
>
> "'However, the description of things to be seized contained in the warrant under review is not so broad that the authorization constitutes a general exploratory search. Certainly, "an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." *Vonder[A]he v. Howland,*

508 F.2d 364 (9th Cir.1974); W. LaFave, 2 *Search and Seizure,* Section 4.6, n. 11 (1978) (hereinafter *Search*).

"'However, a less precise description is required of property which is, because of its particular character, contraband.

"'"'If the purpose of the search is to find a specific item of property, it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property; whereas, on the other hand, if the purpose is to seize not a specific property, but any property of a specified character, which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and it may be described generally as to its nature or character."'

"'2 *Search,* p. 101, citing *People v. Schmidt,* 172 Colo. 285, 473 P.2d 698 (1970).'

"*Palmer v. State,* 426 So.2d 950, 952 (Ala.Crim.App.1983).

"*Thus, in the instant case, the search warrant sufficiently described that law-enforcement officers were authorized to search for illicit drugs, which would include, but not be limited to, marijuana.* Thus, the search was lawful, and the trial court erred when it granted Jenkins's motion to suppress."

State v. Jenkins, [Ms. CR-05-1833, May 25, 2007] ___ So.2d ___, ___ (Ala.Crim.App.2007) (emphasis added).

Stated simply, the plurality opinion, after quoting general principles of law, merely concluded, with no legal or factual analysis, that the description in the warrant of the property to be seized was sufficient.

In his special writing, Judge Welch correctly explained that the lead opinion's reliance on *Palmer* was misplaced:

> "In its opinion reversing the trial court's order granting Jenkins's pretrial motion to suppress evidence, the main opinion holds that the trial court's ruling was in error because, it reasons, the warrant authorized law-enforcement officers to conduct a search for 'drugs,' and that description was constitutionally sufficient. In reaching its conclusion, the main opinion relies upon this Court's decision in *Palmer v. State*, 426 So.2d 950 (Ala.Crim.App.1983). However, because *Palmer* is distinguishable from the instant case, I disagree with the main opinion's analysis as to this issue. . . .
>
> "*Palmer* involved a challenge to a warrant that authorized a search for "'cocaine, . . . or any other illegal substances as described under the provisions of the Alabama Uniform Controlled Substances Act."' 420 So.2d at 952. This Court determined that the portion of the warrant authorizing a search specifically for cocaine was constitutionally sufficient and was severable from the portion authorizing a search for 'any other illegal substance,' which was deemed invalid for lack of probable cause. Ultimately in *Palmer*

> the drugs were admitted under the plain-view exception to the warrant requirement."

Jenkins, ___ So.2d at ___ (Welch, J., concurring in the result).

In its brief to the Court of Criminal Appeals, the State cited only *Palmer* and argued only that *Palmer* is "essentially identical" to Jenkins's case. However, as Judge Welch explained, *Palmer* is clearly distinguishable. Before this Court, the State acknowledges that the Court of Criminal Appeals "relied on *Palmer* only for general principles of law concerning general exploratory searches," State's brief, at 16-17, and does not even attempt to explain how those general principles support the Court of Criminal Appeals' holding in this case.

Jenkins contends that the Court of Criminal Appeals' decision conflicts with its prior decision in *Peavy*, supra. In *Peavy*, the affidavit for a search warrant attested to the presence of "'controlled substances in a mobile home located [at a particular place]."' 336 So.2d at 200. The search warrant directed "'immediate search on the person of each and every person present in or near said mobile home and any motor vehicle adjacent to said mobile home for the following property: *Any controlled substances* prohibited by the laws of the State of Alabama."' 336 So.2d at 201 (emphasis added). The Court of Criminal Appeals held that the search warrant was unconstitutionally broad.

> "We turn now to a consideration of the search warrant and note at once that it is a complete departure from the affidavit. By its very language it authorizes a general exploratory search. General exploratory searches are forbidden by Federal and State courts alike. *Haynes v. State,* 50 Ala.App. 96, 277 So.2d 372 [(1973)]; *Go-Bart v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 [(1931)]; *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 [(1965)]; *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 [(1967)].
>
> " . . . The Fourth Amendment's requirement that a warrant particularly describe the place to be searched and the things to be seized makes general searches impossible and prevents seizure of one thing under a warrant describing another and nothing is left to the discretion of the officer executing the warrant as to what is to be taken. The search warrant in this case is a dragnet instrument and cannot pass Constitutional muster."

336 So.2d at 202.

There is no material difference between the search warrant condemned as unconstitutionally broad in *Peavy* and the search warrant issued in this case. Neither warrant identified any particular drug, and both warrants authorized the search of a particular residence, as well as persons or vehicles at or near the residence. Faced with *Peavy,* the State

candidly admits that "the search warrant [in this case] could have been worded more carefully." State's brief, at 15. I agree with Jenkins that the Court of Criminal Appeals' decision in *Jenkins* conflicts with their prior decision in *Peavy*.

Before this Court, the State makes three new arguments in support of the Court of Criminal Appeals' reversal of the trial court's order granting Jenkins's motion to suppress. First, it argues that "reading the warrant in connection with the supporting affidavit clearly identified the specific property to be seized – marijuana and contraband or items connected with the use, sale, or storage of marijuana." State's brief, at 21. Second, it argues that "the evidence was admissible pursuant to the good-faith exception to the exclusionary rule in *United States v. Leon,* 468 U.S. 897, 922 (1984)." State's brief, at 22. Third, it argues that, "since an officer could search in all the same places whether the warrant specified a search for 'marijuana' or 'illegal drugs' or 'drugs' or any similar term, the warrant in this case does not increase the likelihood of an unauthorized rummaging through Jenkins's personal effects." State's brief, at 21-22. However, these arguments come too late, and this Court should not consider them. It is fundamental that "[a]n argument not made on appeal is abandoned or waived." *Avis Rent A Car Sys., Inc. v. Heilman,* 876 So.2d 1111, 1124 n. 8 (Ala.2003). See also *Brownlee v. State,* 666 So.2d 91, 93 (Ala.Crim.App.1995). Consequently, the Court of Criminal Appeals' reversal of the trial court's order

should not be sanctioned based upon arguments never made to the appellate court.

For the foregoing reasons, the judgment of the Court of Criminal Appeals should be reversed, and the case should remanded to that court.

SEE, J., concurs.

2007 WL 1519000 (Ala.Crim.App.)

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

STATE of Alabama

v.

Wayne Lamar JENKINS.

CR-05-1833.

May 25, 2007.

Troy King, atty. gen., and Tracy Daniel, asst. atty. gen., for appellant.

David Whittlesey, Opelika, for appellee.

WISE, Judge.

The State of Alabama appeals from the trial court's grant of Wayne Lamar Jenkins's pretrial motion to suppress evidence he says was illegally seized. *See* Rule 15.7, Ala. R.Crim. P.

The record indicates that on April 22, 2005, Capt. Van Jackson of the Lee County Sheriff's Department received a telephone call from an individual named Ronnie Paul, who resides at [Home Address Omitted]. Paul said that he had seen four men who were attempting to break into his neighbor's home at [Home Address Omitted]. Paul provided a detailed description of the four men and described the vehicle they were driving. Shortly thereafter, sheriff's deputies stopped a vehicle in the vicinity of [Home Address Omitted] that matched the description given by Paul. Capt. Jackson testified that the two men inside the vehicle admitted that they had tried to

break into the residence located at [Home Address Omitted]. Based on information received from the two men, the two other suspects were eventually located, and all four were arrested. Capt. Jackson stated in his affidavit in support of his application for a search warrant as follows:

> "After being advised of their rights, all four subjects stated that they had attempted to break into the home because they know that the owners keeps [sic] large sums of marijuana inside the residence. One of the four defendants, Michael Stanford, stated that over the past six months, he has purchased at least an ounce of marijuana from Wayne every week. According to Stanford, each of these transactions occurred in Wayne's home and there was a large quantity of marijuana present inside the residence. The Lee County Sheriff's Office was able to confirm through a tag placed on a vehicle in the front yard of the home that Wayne Lamar Jenkins is the owner of the residence. A check of Jenkins' criminal history revealed that he was arrested in 1979 on drug related charges."

(C.R. 48.)

One of the four suspects apprehended by law-enforcement officers, Michael Stanford, gave an interview and stated that he tried to break into Jenkins's apartment to steal Jenkins's marijuana. Stanford, who knew Jenkins only as "Wayne," stated that he had been regularly purchasing marijuana

from Wayne for around six months. Stanford told police that he would buy an ounce of marijuana each week and that Wayne always had a large supply available. Stanford recalled that on one occasion, Wayne had four gallon containers that were full of marijuana. Stanford said that at the present time, Wayne probably had at least a pound of marijuana in his apartment. Stanford told investigators that he had purchased ½ ounce of marijuana from Wayne approximately two weeks before the attempted burglary. Stanford said that he and his three friends had been watching the apartment on the day before the attempted burglary to observe the neighborhood and prepare for their attempt.

The three other suspects all stated that they had attempted to burglarize Jenkins's apartment to steal Jenkins's marijuana. They stated that Jenkins kept a large amount of marijuana in his home and that they all decided to break in and steal the contraband. However, none of these three suspects had any personal knowledge that Jenkins kept marijuana inside his apartment.

A search warrant was ordered for any and all vehicles, people, or buildings located on or within the curtilage of the residence of [Home Address Omitted], identifying the address as that of Wayne Lamar Jenkins. The warrant authorized a search of the residence for any and all drugs, contraband, or items associated with, but not limited to the use, sale, and/or storage of, such items. The search warrant was issued to Capt. Van Jackson on April 22, 2005.

During the search, law-enforcement officials found over five pounds of marijuana, plastic bags, a financial ledger, a .38-caliber pistol with a box of ammunition, scales, a grinder, rolling papers, and approximately $5,000 in cash. Officers also found a marijuana cigarette in Jenkins's automobile. In his statement to law-enforcement officers, Jenkins admitted that he had been selling marijuana for approximately six months. He stated that the cash found in his apartment was proceeds from the sale of marijuana. He also stated that he had previously been arrested in Russell County for driving under the influence and possession of marijuana.

In June 2006, a suppression hearing was held in the trial court. At the hearing, Capt. Jackson testified regarding the circumstances that led to his application for the search warrant. Capt. Jackson stated that on April 22, 2005, the sheriff's office received a telephone call from Ronnie Paul, who told him that he had observed four men attempting to break into a neighbor's home. Capt. Jackson testified that Deputy Bill McQuire responded to the call and talked with Paul. Paul gave Deputy McQuire a description of the four men, along with a description of the car they were driving. Capt. Jackson said that, after receiving that information from Deputy McQuire, he spotted a car matching the description less than ½ mile from the scene of the attempted burglary. Capt. Jackson said that there were two men in the car and that both were taken into custody and interviewed. Before the two men were taken into

custody Paul identified them as two of the individuals who attempted to burglarize Jenkins's residence.

After the two men were taken into custody and interviewed, the names of the two remaining suspects were disclosed. Eventually all four men, including Stanford, were interviewed. Capt. Jackson testified that the four men each said that they had attempted to break into Jenkins's apartment to steal marijuana. Capt. Jackson established that he had had no contact with Stanford before Stanford's arrest in this case. Capt. Jackson testified that, after reviewing the statements of the suspects, he prepared an affidavit to support the request for a search warrant. Before he applied to the court for the warrant, Capt. Jackson said that he and other officers verified the identity of the individual whom one of the suspects identified as "Wayne" by running a license-plate check through law-enforcement databases with the license number on the automobile parked in front of the residence. That exercise revealed that the owner of the automobile was Wayne Lamar Jenkins. In addition, officers contacted the landlord of the apartment complex, and that individual verified that the apartment was leased to Wayne Lamar Jenkins. Capt. Jackson added that during the course of the investigation, a criminal-background check was conducted, which revealed that Jenkins had had a prior drug arrest in Russell County in 1979.

Capt. Jackson went to Jenkins's apartment and conducted the search. During the search, Jenkins was present on the porch of the apartment with other

officers. After the search concluded, Capt. Jackson interviewed Jenkins inside the apartment. Jenkins was advised of his *Miranda*[1] rights. After he waived his rights, Jenkins gave a statement in which he admitted selling marijuana from his apartment.

At the conclusion of the evidence at the suppression hearing, the trial court initially denied Jenkins's motion. Defense counsel asked the trial judge to accept a brief on the issue before it rendered its judgment. The trial court granted defense counsel's request; the court also granted the State an opportunity to respond to defense counsel's brief. On June 28, 2006, the trial court changed its initial denial of Jenkins's motion to suppress and issued an order granting Jenkins's motion to suppress.

On appeal, the State argues that the trial court erred when it granted Jenkins's motion to suppress evidence. Specifically, the State argues that, contrary to Jenkins's assertions that there was no probable cause to conduct a search based on the unreliable, unverified information from a confidential informant, there was sufficient probable cause to support the issuance of the search warrant, and the judgment of the trial court should be reversed.

When determining probable cause, "[a]n issuing judge's determination that sufficient probable cause

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

existed to support the warrant is 'entitled to great deference and is conclusive in the absence of arbitrariness,'" *Wamble v. State,* 593 So.2d 109, 110 (Ala.Crim.App.1991), quoting *United States v. Pike,* 523 F.2d 734 (5th Cir.1975). A reviewing court need determine only that a magistrate or judge had a "substantial basis" for concluding that probable cause existed. *Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Sullivan v. State,* 651 So.2d 1138 (Ala.Crim.App.1994); *McCray v. State,* 501 So.2d 532 (Ala.Crim.App.1986). This Court has previously stated:

> "'The present test for determining whether an informant's tip establishes probable cause is the flexible totality-of-the-circumstances test of *Illinois v. Gates,* [462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)]. The two prongs of the test of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), involving informant's veracity or reliability and his basis of knowledge, "are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates,* [462 U.S. at 223,] 103 S.Ct. at 2329. . . . Probable cause involves "a practical, common sense decision whether,

> given all the circumstances, . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates,* [462 U.S. at 238,] 103 S.Ct. at 2332.'

"*Pugh v. State,* 493 So.2d 388, 392 (Ala.Cr.App.1985), aff'd, 493 So.2d 393 (Ala.1986).

> "Reference to a confidential informant's "track record" of past performances is a viable means of determining his credibility.' *Reese v. State,* 456 So.2d 341, 349 (Ala.Cr.App.1982), cert. denied, 464 U.S. 838, 104 S.Ct. 127, 78 L.Ed.2d 124 (1983). *See also Moynes v. State,* 568 So.2d 392, 393 (Ala.Cr.App.1990); *Carter v. State,* 435 So.2d 137, 139 (Ala.Cr.App.1982). . . . In addition, corroboration supplied by the personal observations of the police officers lends support to the reliability and veracity of the informant. *See Moynes,* 568 So.2d 392; *Dale v. State,* 466 So.2d 196 (Ala.Cr.App.1985)."

Money v. State, 717 So.2d 38, 42-43 (Ala.Crim.App.1997). Additionally, the State is not required to show that the informant has proven to be reliable any particular number of times. *See Reese v. State,* 456 So.2d 341 (Ala.Crim.App.1982).

> "The fact that a confidential informant has not supplied information numerous times does not mean that the informant is not reliable. *Kirk* [*v. State,*] 612 So.2d [1252] at 1254 [(Ala.Crim.App.1993)]. Common sense

> dictates that a confidential informant 'must be a first time informer before [the informant] can inform a second time.' 612 So.2d at 1254."

Usery v. State, 668 So.2d 919, 921 (Ala.Crim.App.1995).

The record contains the order of the trial court granting Jenkins's motion. In that order, the trial court found that because the search warrant contained the general term "drugs" rather than a more specific designation "marijuana," the search warrant permitted law-enforcement officers to conduct an unconstitutional general search for any and all drugs. Because the affidavit in support of the request for the search warrant specifically identified "marijuana," the trial court held that the search warrant should have been equally specific.

In addition, the order indicates that the trial court found that the statements from the three other suspects who were with Stanford when the attempted burglary occurred did not support that portion of the affidavit in which Capt. Jackson stated that all four suspects said that they knew that the resident of the apartment kept large amounts of marijuana inside the apartment. The trial court further stated that the three other suspects knew about the marijuana only because the fourth suspect, Stanford, told them about it and not, as the affidavit stated, from personal knowledge. The trial court notes that in his statement to police, Stanford did not say that each

time he bought drugs from Jenkins that the drug transactions took place in Jenkins's apartment.

The trial court also found that, although Stanford's statement supported Capt. Jackson's averment regarding large amounts of marijuana kept at Jenkins's apartment, Capt. Jackson never addressed Stanford's credibility. The trial court specifically noted that there was no comment on Stanford's reliability as an informant, there were no underlying circumstances identified from which Jackson could have concluded that the informant was credible or that his information was reliable.

In any event, the court did find that Stanford's statements that he had been purchasing marijuana from Jenkins for approximately six months and that he bought over an ounce of marijuana in one week's time established that the period of two weeks since his last purchase of ½ ounce of marijuana was not a period of time that would, if supported by additional information, be too stale to allow the issuance of a search warrant.

Here, we believe that the trial court incorrectly determined that the search warrant authorized an unconstitutional "general search" for all drugs in Jenkins's apartment. We recognize that

> "[g]eneral exploratory searches and seizures, with or without a warrant, can never be justified and are forbidden and condemned. *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). The specific

> command of the Fourth Amendment to the Constitution of the United States is that no warrants shall issue except those 'particularly describing the . . . things to be seized.'
>
> "However, the description of things to be seized contained in the warrant under review is not so broad that the authorization constitutes a general exploratory search. Certainly, 'an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.' *Vonder[A]he v. Howland,* 508 F.2d 364 (9th Cir.1974); W. LaFave, 2 *Search and Seizure,* Section 4.6, n. 11 (1978) (hereinafter *Search*).

"However, a less precise description is required of property which is, because of its particular character, contraband.

> "'"If the purpose of the search is to find a specific item of property, it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property; whereas, on the other hand, if the purpose is to seize not a specific property, but any property of a specified character, which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and it may be described generally as to its nature or character."'

"2 *Search,* p. 101, citing *People v. Schmidt,* 172 Colo. 285, 473 P.2d-698 (1970)."

Palmer v. State, 426 So.2d 950, 952 (Ala.Crim.App.1983).

Thus, in the instant case, the search warrant sufficiently described that law-enforcement officers were authorized to search for illicit drugs, which would include, but not be limited to, marijuana. Thus, the search was lawful, and the trial court erred when it granted Jenkins's motion to suppress.

The State also argues that the trial court erred when it found that the prosecution had failed to establish the reliability of Michael Sanford [sic], who supplied police with the information about the marijuana inside Jenkins's apartment. At the suppression hearing, both defense counsel and the trial court referenced Sanford [sic] as an "informant." Jenkins's argument on appeal is that no proof was offered that Sanford [sic] had assisted law enforcement in the past, and there was no proof of his veracity.

As noted in this opinion, this Court has previously held that the fact that an informant has never given information before does not suggest that his information is per se unreliable. *See McCray v. State,* 501 So.2d 532 (Ala.Crim.App.1986).

Based on the totality of the circumstances, the search warrant was supported by probable cause. Accordingly, the order denying the motion to suppress

is reversed and this case is remanded to the circuit court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MCMILLAN, J., concurs. BASCHAB, P.J., and SHAW, J., concur in the result. WELCH, J., concurs in the result, with opinion. WELCH, Judge, (concurring in the result).

In its opinion reversing the trial court's order granting Jenkins's pretrial motion to suppress evidence, the main opinion holds that the trial court's ruling was in error because, it reasons, the warrant authorized law-enforcement officers to conduct a search for "drugs," and that description was constitutionally sufficient. In reaching its conclusion, the majority relies upon this Court's decision in *Palmer v. State,* 426 So.2d 950 (Ala.Crim.App.1983). However, because *Palmer* is distinguishable from the instant case, I disagree with the majority's analysis as to this issue. Therefore, I concur in the result.

Palmer involved a challenge to a warrant that authorized a search for "'cocaine, . . . or any other illegal substances as described under the provisions of the Alabama Uniform Controlled Substances Act.'" 420 So.2d at 952. This Court determined that the portion of the warrant authorizing a search specifically for cocaine was constitutionally sufficient and was severable from the portion authorizing a search for "any other illegal substance," which was

deemed invalid for lack of probable cause. Ultimately in *Palmer* the drugs were admitted under the plain-view exception to the warrant requirement.

In the present case, the description in the warrant of "drugs," even if characterized as illicit or contraband, is vague and overly broad, because it is a generic term that could potentially apply to a wide variety of items.[2] However, the good-faith exception articulated in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), is applicable to the facts of this case. Because the officers' reliance on the determination of the magistrate who issued the search warrant and found probable cause to exist was objectively reasonable, suppression of the contraband seized pursuant to the warrant was inappropriate. Therefore, I concur in the result.

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[2] In *Peavy v. State*, 336 So.2d 199, 201 (Ala.Crim.App.1976), this Court determined that a search warrant describing "'[a]ny controlled substances prohibited by the laws of the State of Alabama'" failed to pass constitutional muster in that it authorized a general exploratory search.

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
Plaintiff,	*	
	*	
v.	*	**Case No. CC-06-327**
WAYNE LAMAR JENKINS,	*	
	*	
Defendant.	*	

ORDER

(Filed Jun. 28, 2006)

On the 7th day of June 2006 a Hearing was held on the Defendant's "Motion to Suppress." The Defendant, Wayne Lamar Jenkins, was present with his attorney, Davis B. Whittlesey, and the State of Alabama was represented by Assistant District Attorney, Kenneth E. Gibbs. During the Hearing the Defense Counsel requested certain items from the State that were necessary before the Hearing could proceed. The State agreed to provide the items and the Hearing was continued until June 14, 2006.

On June 14, 2006, all parties who were present at the earlier Hearing were again present. The Court continued with the Hearing on the Defendant's "Motion to Suppress" wherein the Defendant asked the Court to suppress any and all the evidence and/or statements obtained against and/or from the Defendant during a search conducted by officers from the Lee County Sheriff's Office (LCSO), on April 22,

2005, pursuant to a search warrant which authorized a search of "[A]ny/and all vehicles people or buildings located on or within the curtiledge [sic] of the residence of [Home Address Omitted]." This location described within the search warrant is the residence of the Defendant. The Court requested, and the parties agreed, that the Court would withhold a ruling on the Motion to allow time for the attorneys to each present a brief in support of their positions concerning the Motion to Suppress. The briefs of the attorneys have now been received and evaluated by the Court.

I. The Defendant's Contentions:

The Defendant contends that the search warrant was not a valid search warrant for the following reasons:

1. The search warrant was issued based on the "self-serving bald accusations" by a person "with unknown reliability, and without corroboration."

2. Suppression is an appropriate remedy if the Judge who granted the search warrant was misled by information in the "Application and Affidavit For Search Warrant" that the affiant knew was false, or would have known was false except for his disregard of the truth.

3. It is illegal to bar a home owner from his residence prior to a Court finding probable cause to issue a search warrant.

4. The law requires that statements and evidence, obtained from a person who was illegally arrested as a result of an invalid search warrant, be suppressed as "fruit of the poisonous tree."

After hearing the testimony presented at the Suppression Hearing: evaluating the briefs of the attorneys; the exhibits; and, the arguments of the attorneys, the Court finds:

II. The Search Warrant:

1. LOCATION TO BE SERACHED [sic]:

The location where the law enforcement offices were to conduct the search is stated in detail and is in compliance with the test stated in *Roberson v. State*, 864 So.2d 379, Ala.Crim.App., 2002:

> "The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched." *United States v. Gitcho*, 601 F.2d 369, 371 (8th Cir.) (Citations omitted in original), cert. denied, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96, 1979.

2. PROPERTY TO BE SEARCHED FOR AND SEIZED:

The search warrant states that the items which the law enforcement officers are authorized to search for, and to seize, are:

> "Any/all, **drugs**, contrabans (sic) or items of evidence connected to but not limited to the (scales, pipes, baggies, cash, weapons, documents, etc.) use, sell (sic), and/or storage of these type items." (Emphasis added)

The Court, in examining this section of the search warrant, must evaluate the type property, items or things that are "particularly described"[1] in the search warrant and are authorized to be seized, if located during the search, as specified within the search warrant. Taking out the specific items listed, i.e. drugs, scales, pipes, baggies, cash, weapons, and documents, and evaluating the language remaining in the search warrant it becomes evident that this warrant is a "general search warrant" allowing for the law enforcement officers to conduct an unlimited search, of the authorized location, and to seize **"any and all, contrabands or items of evidence, but not limited to these types of items**." This wording gives the law enforcement officers the right to conduct a "general search" of the property and to seize any and all items which, in their opinion, may be:

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[1] Rule 3.9, Alabama Rules of Criminal Procedure, Issuance of Search Warrant.

(1) drugs; (2) contrabands; or (3) items of evidence, that are connected to, **but not limited to the** (scales, pipes, baggies, cash, weapons, documents, etc.) use, sale, and/or storage of **these type items**." The term "these type items" as used in this search warrant applies to not only the drugs, but to any other contraband, or items of evidence that may be found during the search. This type search warrant authorized a "general search" of the location and this type of search warrant has been declared to be unconstitutional by the Appellate Courts of Alabama as well as the US Supreme Court.

Nowhere in the search warrant was there a reference to the search being for **marijuana**.[2] The only thing other than "contraband" and "items of evidence" was the general term "**drugs**," without stating if these "drugs" to be searched for were: "illegal drugs;" "prescription drugs;" or, "over-the-counter drugs."

III. The Affidavit For Search Warrant:

In examining the Affidavit the Court is guided by *Moore v. State*, 650 So.2d 958, Ala.Cr.App., 1994, wherein the Court of Criminal Appeals, quoting from *Poole v. State*, 596 So.2d 632, 641, Ala.Cr.App. 1992, stated:

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[2] Marijuana was the illegal substance named in the LCSO Investigator's Affidavit furnished to the Judge at the time the search warrant was requested.

> "'For a search warrant to be sufficient and satisfy the constitutional requirement of probable cause, the **affidavit** upon which it is based **must state specific facts** and **circumstances** which support a finding of probable cause.' *Carter v. State*, 405 So.2d 957, 959 (Ala.Cr.App.), cert. denied, 405 So.2d 962, Ala. 1981.' *Callahan v. State*, 557 So.2d 1292, 1304, Ala.Cr.App, affirmed, 557 So.2d 1311, Ala. 1989, cert. denied, 498 U.S. 881, 111 S.Ct. 216, 112 L.Ed.2d 176, 1990. (Cites omitted) "Additionally, 'where a magistrate has found probable cause, the courts **should not** invalidate the warrant by **interpreting the affidavit in a hypertechnical** rather than a **common sense manner**, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants.' *Maddox v. State*, 502 So.2d 779, 785, Ala.Cr.App, 1985, affirmed in part, remanded on other grounds, 502 So.2d 786, Ala, cert. denied, 479 U.S. 932, 107 S.Ct. 404, 93 L.Ed.2d 357, 1986."

In the "Application and Affidavit For Search Warrant" prepared and presented to the Judge, the LCSO Investigator stated that LCSO had received a call from a person identified as Ronnie Paul informing the LCSO that four males were attempting to break into his neighbor's home. The caller provided a description of the four men and a description of the vehicle they had left in. A LCSO Deputy located the vehicle and stopped it. There were two individuals in the vehicle and they both admitted that they had

attempted to break into a residence.[3] The other two suspects were also located by LCSO and all four were arrested. In the affidavit the affiant further stated:

> "[a]ll four subjects stated that they had attempted to break into the home because they know that the owners (sic) keeps (sic) large sums of **marijuana** inside the residence. One of the four defendants, Michael Stanford, stated that over the past six months he has purchased at least an ounce of **marijuana** from Wayne every week. According to Stanford, each of these transactions occurred in Wayne's home and there was a large quanity (sic) of **marijuana** present in the residence." (Emphasis added)
>
> " * * * *
>
> "A check of Jenkins' criminal history revealed that he was arrested in 1979 on drug related charges."

The affidavit makes reference only to "**marijuana**" being present in the home but the search warrant replaced the term "**marijuana**" with the term "**drugs**."

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[3] Identified to be the residence where the caller had seen four men attempting to break-in. This residence was identified by the caller a [sic] being the residence of the Defendant, Wayne Lamar Jenkins. LCSO was able to confirm, by a license tag check, that this was the residence of the Defendant.

In *Peavy v. State*, 336 So.2d 199, Ala.Cr.App, 1976, a case where the officer's affidavit stated in part:

> "that he has this day been informed by a **reliable** informant **who has given him correct information in the past,** that there are **controlled substances** in a mobile home located [at] . . . which said mobile home is usually occupied by one '[name of occupant]; that said informant has within the last 36 hours observed **controlled substances** in said mobile home and based upon said information he believes that **controlled substances** are situated in said mobile home."

The search warrant in *Peavy* stated that the law enforcement officers were to search for "**Any controlled substances prohibited by the laws of the State of Alabama**."

The Court of Criminal Appeals in *Peavy* stated:

> "We turn now to a consideration of the search warrant and note at once that **it is a complete departure from the affidavit**. By its very language **it authorizes a general exploratory search**. **General exploratory searches are forbidden by Federal and State courts alike.** *Haynes v. State*, 50 Ala.App. 96, 277 So.2d 372; *Go-Bart v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; *Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431.

> "There is nothing in this record indicating that any other information was imparted to [the] Judge at the time he issued the search warrant in this case. **The Fourth Amendment's requirement that a warrant particularly describe** the place to be searched and **the things to be seized makes general searches impossible** and **prevents seizure of one thing under a warrant describing another** and **nothing is left to the discretion of the officer executing the warrant as to what is to be taken.** The search warrant in this case is a **dragnet instrument** and **cannot pass Constitutional muster**. (Emphasis added)

In this case the LCSO Investigator substituted the term "**drugs**" in the search warrant prepared for the Judge instead of using the term "**marijuana**" from the affidavit and thereby made the search warrant one for an unconstitutional "general search" for "all drugs."

In *Drill Parts and Service Co., Inc. v. Joy Mfg. Co.*, 619 So.2d 1280, Ala., 1993, the Supreme Court said:

> "The Alabama Court of Criminal Appeals has held that a **search warrant is not invalid merely because it provides only a general description of the property** to be seized, '**if a more precise description is not possible.**'" *State v. Teague*, 469 So.2d 1310, 1317, Ala.Crim.App. 1985. (Emphasis added)

In this case it is obvious that there was available to the affiant a more precise description of the items to be searched for than that which he listed within the search warrant, i.e. "**drugs**." He could have, and according to case law, should have, used the term from his affidavit, "**marijuana**."

The issue of "general searches" has been with the Courts for many years. In *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344, 51 S.Ct. 153, U.S., 1931, the US Supreme Court in evaluating this issue stated:

> "The second clause [of the Fourth Amendment] declares: 'And no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and **particularly describing the . . . things to be seized.**' This prevents the issue of warrants on loose, vague or doubtful bases of fact. **It emphasizes the purpose to protect against all general searches.** Since **before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union.** *Agnello v. United States*, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409. The need of protection against them is attested alike by history and present conditions. **The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.** *Boyd v.*

> *United States*, 116 U. S. 616, 623, 6 S. Ct. 524, 29 L. Ed. 746. *Weeks v. United States, supra*, pages 389-392 of 232 U. S., 34 S. Ct. 341. (Emphasis added)

The Court next turned to evaluating the issue of "probable cause" for issuing a search warrant in this case as stated by the LCSO Investigator in the affidavit. In *Drill, supra,* the Supreme Court quoting from *Alford v. State*, 381 So.2d 203, 205, Ala.Crim. App. 1979, said:

> "'[s]ufficient evidence must be stated in the affidavit to support a finding of probable cause for issuing the search warrant,' and '[t]he affidavit must state specific facts or circumstances which support a finding of probable cause[;] otherwise the affidavit is faulty and the warrant may not issue.'
>
> " * * *
>
> "Although an affidavit to obtain search warrant for illegal drugs may be based on hearsay information and need not reflect the direct personal observation of the affiant, the issuing authority of the search warrant **must be informed of some of the underlying circumstances from which the informant concluded that the drugs were where he claimed they were**, and **some of the underlying circumstances from which the officer concluded that the informant**, whose identity need not be disclosed, **was credible or his information reliable**." (Emphasis added)

The Supreme Court in *Vinson v. State*, 843 So.2d 229, Ala., 2001, stated that:

> "Whether the circumstances recited in an affidavit offered in support of an application for a search warrant are such that the probable cause that might once have been demonstrated by them has grown 'stale' is a matter that '**must be determined by the circumstances of each case**.' *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260, 1932.
>
> " * * *
>
> "[T]he 'basic criterion as to the duration of probable cause [or staleness] is the inherent nature of the crime.' *United States v. Magluta*, 198 F.3d 1265, 127, 11th Cir. 1999, quoting *United States v. Bascaro*, 742 F.2d 1335, 1345, 11th Cir. In *Moore v. State*, 416 So.2d 770, Ala.Crim.App. 1982, **Alabama recognized that a determination of 'staleness' must turn on the circumstances of each case**. In *Moore*, the Court of Criminal Appeals concluded that the information in an affidavit supporting a search warrant was not so stale as to negate a finding of probable cause, even though some of the information in the affidavit concerning the allegedly stolen items sought by the warrant was approximately two months old at the time the warrant was executed. The court in *Moore* considered staleness in terms of whether the affidavit information was 'fresh' or 'remote,' and stated:

"What is 'fresh' and how is it distinguished from 'remote?' **We do not perceive of any magical formula by which a precise computation of the time period may be made.** Rather, the underlying circumstances – including such matters as the basis of the informant's knowledge, the ease or difficulty in moving the items since they were last observed, the use or probable use to which the items are put, and the mobile nature or degree of permanence of the place of concealment – must be examined by a neutral and detached magistrate to reach a determination as to the probability of whether the proof speaks as of the time of the issuance of the search warrant." 416 So.2d at 772. *See also Nelms v. State*, 568 So.2d 384, Ala.Crim.App. 1990. (Emphasis added)

In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, U.S.Ill., 1983, the Court stated:

"We agree with the Illinois Supreme Court that **an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report**, they should be understood simply as **closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place**.

" * * * *

"Obviously any **reliance upon factual allegations** necessarily **entails some degree of reliability upon the credibility of the source**. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. . . . *It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.* *Id.*, at 224-225, 85 S.Ct., at 1371 (Emphasis in italics in original).

" * * *

"If an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary. *Adams v. Williams, supra.*

"Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.

"It is enough, for purposes of assessing probable cause, that '**corroboration through other sources of information reduced**

the chances of a reckless or prevaricating tale,' thus providing '**a substantial basis for crediting the hearsay**.'" *Jones v. United States*, *supra*, 362 U.S., at 269, 271, 80 S.Ct., at 735, 736 (**Bold print** emphasis added)

In *Drill, supra*, the Court stated that:

"This Court in *Nelms v. State*, 568 So.2d 384, Ala.Crim.App. 1990, found that an affidavit supporting the warrant issued for the search of Nelms' residence was deficient **for failing to state when the drugs were seen by the informant** at the appellant's residence. . . . The almost identically-worded affidavit in the present case is likewise deficient, because **it fails to refer to the date when the informant allegedly observed cocaine at the appellant's residence**."

" * * *

"**The hearsay in these recitations is not only without any dates to establish recency but is without attribution or detail to establish reliability.**

"[A] magistrate must be presented with facts as to the source of the information in the affidavit and the **underlying circumstances from which it could be concluded that the source was reliable**.' *United States v. Kirk*, 781 F.2d 1498, 1505 (11th Cir.1986)." *Sims v. State*, 587 So.2d 1271, 1275 (Ala.Crim.App.1991). (emphasis added)

When the LCSO's Investigator prepared his Affidavit he included, as part of his presentation of probable cause for issuing the search warrant, the following:

> "[a]ll four subjects stated that they had attempted to break into the home because they know that the owners (sic) keeps (sic) large sums of marijuana inside the residence."

However, when cross examined by Mr. Whittlesey at the Preliminary Hearing held before a District Judge, on May 25, 2005, the LCSO Investigator in charge of the case testified as follows (Transcript, Preliminary Hearing, District Court, May 25, 2005, at pp. 9-11):

> Q. [Mr. Whittlesey] What about the other individuals in the car, the three others you names, did they provide the Lee County Sheriff's Office any information regarding the alleged drug activities of Mr. Jenkins?
>
> A. [LCSO Investigator] They all gave statements. But not that I'm aware of.
>
> Q. All gave statements, meaning after they were arrested?
>
> A. Right. And they were advised of their rights.
>
> Q. I understand that. But did they give you any information or give anybody in the

Lee County Sheriff's Office any information upon which Lee County Sheriff's Office based their warrant?

A. In their statements they did say that Mr. Stanford did provide them the information on why they were breaking in.

Q. I don't understand. In their statements they did what?

A. That Mr. Stanford had gave them information on why he wanted to break into the residence.

Q. But that statement was then given by these three other individuals after the Lee County Sheriff's Office applied for a search warrant. Would that be right or wrong?

A. That would be right.[4]

Q. So the only individual that provided any information forming the basis for a search warrant that you ultimately obtained was Michael Roger Stanley (sic), Jr.

THE COURT: You keep calling him Stanley, it's Stanford.

---

[4] It should be pointed out that the Court finds that in fact the statements of the four men were taken by several different officers from LCSO. Stanford at 11:11 AM, 04/22/05; Newman at 11:11 AM, 04/22/05; Matthews at 11:43 AM, 04/22/05; and, Feast at 11:50 AM, 04/22/05, The Search warrant was signed by the Judge at 1:15 PM, 04/22/05.

MR. WHITTSLEY [sic]: Excuse me. Stanford, Jr.

A. It was based off of his statement.

Q. Anything else?

A. No.

Later in the Preliminary Hearing when discussing the Affidavit in support of the application for search warrant the following transpired (*Id.*, at p. 13):

Q. Did you provide [the] Judge any further information not contained in this affidavit?

A. No.

Rule 3.9, *Alabama Rules of Criminal Procedure*, states, "Before ruling on a request for a warrant, the judge or magistrate may further examine, under oath, the affiant and any witnesses the affiant may produce." Further, Courts have held that for an affiant to justify a search warrant the affidavit can be supplemented by testimony presented to the Judge at the time the warrant is requested. *Ex parte Perry*, 814 So.2d 840, Ala., 2001 (An affidavit may "be validated if it is supplemented with additional facts which the magistrate considered before determining that probable cause was present). It is obvious from the testimony of the LCSO Investigator at the Preliminary Hearing that no additional information was provided to the Judge to support the affidavit.

The Supreme Court in *Ex parte Parker*, 858 So.2d 941, Ala., 2003, said:

> "[A] magistrate must be presented with facts as to the source of the information in the affidavit and **the underlying circumstances** from which it could be concluded that **the source was reliable**.' *United States v. Kirk*, 781 F.2d 1498, 1505 (11th Cir.1986)." *Sims v. State*, 587 So.2d 1271, 1275 (Ala.Crim.App.1991). "Hearsay information may be sufficient **when its accuracy is corroborated by other facts stated by the affiant as true to his own knowledge**." *Lewis v. State*, 426 So.2d 932, 936 (Ala.Crim.App.1982).
>
> " * * * *
>
> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, the issuing authority of the search warrant must be informed of **some of the underlying circumstances from which the informant concluded that the drugs were where he claimed they were**, and some of the **underlying circumstances from which the officer concluded that the informant**, whose identity need not be disclosed, **was credible or his information reliable**." *Reed v. State*, 401 So.2d 131, 134 (Ala.Crim.App.1981). (Emphasis added)

However, the Court, after reviewing the statements given by the four participants finds that the

only knowledge they gave to the LCSO about the marijuana being in the house was as follows:

1. ***Bradley E. Newman*** (Defendant's Exhibit D-2) – "When Mike [Defendant, Michael Stanford] came to Matts (sic) [Justin Matthews'] house this morning, he told us that there was a **guy that had marijuana in his house** and that we needed to break into the house and get it."

2. ***Aaron David Feast, Jr.*** (Defendant's Exhibit D-3) – "Mike [Defendant, Michael Stanford] came over and said 'I am going to rob the house we looked at yesterday and **take all his weed**.'"

3. ***Justin Matthews*** (Defendant's Exhibit D-4) – "Mike [Defendant, Michael Stanford] said they were going to break in the guy's house and **steal the man's reefer**."

Defendant, Michael Stanford, (Defendant's Exhibit D-1) –

> "We planned to break in and steal some marijuana. Wayne [Defendant, Wayne Lamar Jenkins] **keeps alot** (sic) **of weed in his house** and **I know this because I used to buy weed from him**. I've **been buying** from Wayne **for about 6 months**. **I buy over a ounce of weed in a week time**. I have seen over 4 gallons in his house at one time. **I bought about a ½ ounce 2 weeks ago.** There is a (sic) least a pound in his house now as we speak." (Emphasis added)

The statements by the three co-participants only show that they were *told* by Stanford that *there was marijuana* in Jenkins' house. They do not make any reference to having *personal knowledge of the marijuana being there or how much marijuana could be found/located* there. There is nothing the statements of the three co-participants that support the statement contained within the affidavit that "[a]ll four subjects stated that they had attempted to break into the home because **they know** that the **owners** (sic) **keeps** (sic) **large sums of marijuana** inside the residence."

Further in the affidavit the affiant stated:

> "One of the four defendants, **Michael Stanford, stated** that over the past six months he has purchased **at least an ounce of marijuana** from Wayne **every week**. According to Stanford, **each of these transactions occurred in Wayne's home** and there was a large quanity (sic) of marijuana present in the residence." (Emphasis added)

Again the statement of Stanford does not support that portion of the affidavit that states, "According to Stanford, **each of these transactions occurred** in Wayne's home." – Stanford never stated that *any* of the transactions took place at "Wayne's' house." He stated only that *he had been to Wayne's house*.

As to the issue of there being "a large quanity of marijuana present in the residence," which is a *very* important issue in establishing probable cause to

issue the search warrant, *is* supported by Stanford's statement. In fact, his statement, if believed, would indicate that there *could* have been at least a pound of marijuana in the house on the day Stanford gave his statement. Stanford also stated in his statement:

> "I've been buying from Wayne for about 6 months. I buy over a ounce of weed in a week time . . . I bought about a ½ ounce 2 weeks ago."

The Court in using the standard stated in *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260, 1932, ("Whether the circumstances recited in an affidavit offered in support of an application for a search warrant are such that the probable cause that might once have been demonstrated by them has grown 'stale' is a matter that 'must be determined by the circumstances of each case.'") finds that the statement from Stanford that he had been purchasing marijuana from Jenkins for "about 6 months" and that he bought "over a ounce of weed in a week time" establishes that the period of 2 weeks since his last purchase of ½ ounce of marijuana is not a period of time which would, if supported with additional information, be too stale to allow the issuance of a search warrant in this case. As stated in *Gates, supra*, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."

Having addressed this issue the Court further states that Appellant Courts have frequently found that a warrant is deficient for failing **to state when the drugs were seen by the informant** at the appellant's residence. (*Nelms v. State*, 568 So.2d 384, Ala.Crim. App.1990) (*See also Thomas v. State*, 353 So.2d 54, Ala.Crim.App.1977, "The affidavit stated that the informant 'had observed' heroin being used and sold from the premises described. The affidavit does not state the date or the time the informant allegedly observed the heroin on the premises.")

However, the LCSO Investigator, in his affidavit, failed to address the issue of Stanford's creditability. The Court, and the Judge who issues a search warrant, cannot *assume* that because an individual has been caught and arrested for breaking into another person's residence *he is telling the truth.* If fact it is, in the opinion of this Court, that this person may tell the investigators anything that he believes may help him in his situation.

In *Gates, supra*, the Court stated that:

> **"veracity," "reliability"** and **"basis of knowledge"** are all **highly relevant** in determining **the value of [an informer's] report**, they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place." (Emphasis added)

The US Supreme Court in *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345, 1965, stated:

> "Obviously **any reliance** upon factual allegations **necessarily entails some degree of reliability upon the credibility of the source**. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. . . . *It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.*" *Id.*, at 224-225, 85 S.Ct., at 1371 (Italic emphasis added in original, **bold** emphasis added).

It is the affiant's duty to present to the Judge the facts as to the **source of the information** in the affidavit and the **underlying circumstances from which it could be concluded *that the source was reliable*** to issue search warrant. *Ex parte Parke, supra.*

In *Ex parte Perry, supra,* the Court stated:

> "It is true that the nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation," but "**there still must be a**

> **'substantial basis' to conclude that the instrumentalities of the crime will be discovered on the searched premises.**" *United States v. Lockett*, 674 F.2d 843, 846, 11th Cir.1982. (Emphasis added)

The LCSO Investigator did not provide anything to the Judge, other than the unsupported statement of Stanford. There was no comment on Stanford being a reliable informant, there were not underlying circumstances from which the officer concluded that the informant was credible or that his information was reliable. (*See Reed v. State*, 401 So.2d 131, 134 (Ala.Crim.App.1981)).

There was one additional bit of information provided in the affidavit of the LCSO Investigator in support of the assertion that there was a likelihood that "marijuana" would be found in the Defendant's residence. This information was: "A check of Jenkins' criminal history revealed that he was arrested in 1979 on a drug related charge." The *fact* that the Defendant was *arrested in 1979*, without a *showing of the disposition of the charge* and the *nature of the "drug related" arrest*, is extremely remote to the situation which led to the issuance of this search warrant and adds nothing to the creditability of the information provided by Stanford or to any of the other information provided in the affidavit.

FINDING OF THE COURT:

1. That because of the use of the term "drugs" and the other wording of the search warrant, which was not consistent with the affidavit in support of the application for the search warrant, the search warrant allows for a "general search" of the location and therefore is unconstitutional on its face. *See Peavy, supra, Go-Bar,* and others.

2. The contents of the search warrant were not supported by the affidavit of the LCSO Investigator. Therefore the search warrant fails to meet the requirements of *Drill, supra, Ex parte Parker, supra*, and others, and therefore the search warrant is due to be suppressed.

3. The fact that the LOSO [sic] Investigator did not provide any comment on the reliability of Stanford as an informant, and the totality-of-the-circumstances, the Court finds that there was not sufficient reliable information in the affidavit of the LCSO Investigator to substantiate the issuing of the search warrant.

Therefore it is **ORDERED, ADJUDGED** and **DECREED** that:

1. The Defendant's Motion to Suppress any and all of the evidence seized and/or obtained during the search conducted by the officers of the LCSO, on April 22, 2005, pursuant to the invalid Search Warrant, from the Defendant, and/or from his residence located at [Home Address Omitted] is **GRANTED**.

2. The State of Alabama may not use any of the property, statements of the Defendant, or other evidence obtained during or as a result of the search conducted by the officers of the LCSO, on April 22, 2005, pursuant to the invalid Search Warrant, in this, or any other action against the Defendant, Wayne Lamar Jenkins, in this, or any future action, pertaining to this same arrest/incident.

3. All of the items seized by the officers, at the Defendant's residence located at [Home Address Omitted], shall be returned to the Defendant forthwith with the exception of any marijuana or items of paraphernalia seized which can be identified as being unlawful to posses by a private citizen within the State of Alabama. The State is to provide an inventory of the items classified as "unlawful" which the State desires to retain and a copy thereof to the Court within 30 days after the date of this Order along with a recommendation to the Court for the disposition of these items. Disposition of these items will be made by the Court at this time.

Done this 28th day of June, 2006.

/s/ John V. Denson, II
John V. Denson, II
Circuit Judge

Copy to:
Nick Abbett/Kenneth E. Gibbs
Davis B. Whittlesey

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1061674

Ex parte Wayne Lamar Jenkins

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

Wayne Lamar Jenkins)

(Lee Circuit Court, CC-06-327;
Court of Criminal Appeals, CR-05-1833)

On Application For Rehearing

(Filed Jun. 26, 2009)

MURDOCK, Justice.

APPLICATION OVERRULED; OPINION OF JANUARY 16, 2009, MODIFIED [BY SUBSTITUTION OF PAGES 24 AND 25].

Stuart, Smith, Bolin, and Parker, JJ., concur.

Lyons and Woodall, JJ., dissent.

Cobb, C.J., and Shaw, J.,* recuse themselves.

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* Justice Shaw was a member of the Court of Criminal Appeals when that court considered this case.